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Issue Date: 31 July 2003

LESLIE L. LEWIS
Claimant

v.

UNIVERSAL MARITIME SERVICE
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION
Carrier

2002-LHC-00230
OWCP NO. 06-185118

DECISION AND ORDER

This matter arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the "Longshore Act" or "Act"), as amended, 33 U.S.C. §§§§ 901-950. The Claimant is represented by Clifford Mermell, Esquire and David Pacheco, Esquire, Gillis and Mermell, Miami, Florida. The Employer/Carrier is represented by Lawrence Craig III, Esquire and Frank Sioli, Esquire, Valle and Craig, Miami, Florida. Also participating was Philip Giannikas, Esquire, Department of Labor, Nashville, Tennessee.

At hearing, March 18 to 19, 2003 in Miami, ten (10) Administrative Law Judge Exhibits (hereinafter "ALJ" 1 - ALJ 10). In a telephone hearing on June 19, 2003, ALJ 11 and ALJ 12 were admitted without objection. Twelve (12) Claimant's Exhibits (hereinafter "CX" 1- CX 12) were introduced and accepted into evidence. The Claimant testified on his own behalf and as a rebuttal witness. Live testimony was presented on behalf of the Employer by Alan Herskowithz, M.D.; Robert Chamblin, Jr.,. Michael Miranda and Raymond Escoto, all private investigators; and Theodore Bilski, a Vocational Expert. The Employer's Exhibits 1-22, 24 to 34, (hereinafter "Ex" 1 to Ex 22, Ex 24 - Ex 34) were accepted into evidence.

During the course of the hearing, Mr. Giannikas, for the Director, withdrew the Section 8F issue, with the proviso that if benefits are awarded in this case, that issue would be redetermined at the Director's level. Transcript ("TR") at 90, 385.

After the hearing, the record remained open to provide the Employer/Carrier to take Dr. Peter Millheiser's deposition. That document was received on May 19, 2003 and it has been marked as Ex 35 and entered into evidence. There are now thirty four (34) Employer's exhibits in evidence. On June 19, I granted the parties ten days to comment on whether I could take administrative notice of the ***Dictionary of Occupational Titles*** ("DOT"), published by the United States Department of Labor and the ***Diagnostic and Statistical Manual of Mental Disorders***, Fourth Edition ("DSM-IV"), American Psychiatric Association, Washington D.C. (1994). Neither party objected.

Both parties have submitted briefs, and also the Employer/Carrier submitted an addendum, and the Claimant submitted a reply brief on July 2, 2003. Additionally, I entered an Order requiring submission of better evidence. That evidence was received July 22, 2003.

Issues

1. Whether the Claimant was injured within the course and scope of his employment.
2. Temporary total and or temporary partial disability benefits from March 26, 2001 to present and continuing at the correct compensation rate.
3. Permanent total and or permanent partial disability benefits from the date of maximum medical improvement (MMI) to present and continuing at the correct compensation rate.
4. Correct determination of average weekly wage/compensation rate.
5. Remedial or palliative care for neurosurgical evaluation, orthopedic care and treatment, psychiatric care and treatment and neurological evaluation.
6. First choice of physician. Claimant chooses Dr. Bruce Kohrman in LS - 18 dated September 30, 2002.
7. Penalties , interest, costs, and attorney's fees.

Stipulations

The parties stipulate to the following:

1. That the Notice of Injury and the claim were timely filed. Tr. at 380.
2. I have jurisdiction to hear this case. Tr. at 381.
3. The employer was properly named. Tr at 381.
4. The first date of treatment was March 30, 2001. Tr. at 382.
5. The last date of work was March 26, 2001. Tr. 383.
6. The Director and Employer/Carrier agree that if benefits are awarded in this case, a Section 8(f) issue will be redetermined at the Director's level. Tr. at 90, 385.

Factual Findings

Mr. Lewis, the Claimant, is now sixty-six years of age. Tr., 225. He was deposed by the Employer/Carrier on two occasions and testified live at hearing.[1] He is now retired from the International Longshoreman's Association. Id. He testified that he is in his third marriage and has six children and two step-children, but is having problems, "...with the family situation, dealing with people." Id. After the accident, Mr. and Mrs. Lewis began having marital problems and he moved from the family home in November, 2002. Id., 226.

Mr. Lewis graduated from high school in 1996. Id. at 226. He was a poor student. Id at 227. After school, he could not find a job, so he joined the United States Air Force. Id. After a year and ten months, he left, receiving a medical discharge due to paranoid schizophrenia. Id at 227, 288. During the period of his service he had been hospitalized for two weeks. Id at 288.

Mr. Lewis' career as a longshoreman began in 1978. Tr. at 228. He spent one year in the job until they "ran me away from there". Id. In 1989, he returned to longshore work, and actually began working in early 1990, and continued at it until he was injured on March 26, 2001. Id. at

[1] The Claimant's first deposition was taken on February 14, 2002 appears in both Ex 1 and Ex 3. At the time it was taken, the Claimant was represented by Howard Silverstein, Esq., Miami. On August 14, 2002, the Claimant was re-deposed. Ex 4.

229. In 1978-9 he worked in freezers, unloading cargo consisting of frozen food. Id. He also was a lasher, "...tying cargo down, move shifts, untying cargo from the shift to move it." Id. But he was not limited to these duties, as he was supposed to learn to do "everything". Id. at 230. "When you come to work, you come to work to do whatever your [*sic*, you're] assigned to do for that day." Id. He testified that the work required a great amount of physical exertion. Id at 231. "They have no light duty." Id , 230. He had to climb ladders. Id at 231. He had to lift fifty (50) pounds frequently and occasionally had to lift to a hundred (100) pounds. Id. 231 - 232. He also had to learn to operate heavy equipment, such as bulldozers, forklifts and tractor trailers. Id

Mr. Lewis testified that the longshoreman position is dangerous. "People die all the time." Id. at 233. He also stated that there are a lot of injuries on that job. Id.

After he left the docks in 1979, he tried other jobs, but was never successful. Tr., 235.

Mr. Lewis attended Miami Dade Community College, acquiring more than sixty credits. Tr., at 284-85. However, Mr. Lewis testified that he took classes in un-associated areas so that he does not qualify for a degree. Id at 286. He also attended an electronics trade school. Id at 301. He did not get a degree, but he learned to repair televisions. Id.

In 1979, he went to work for the United States Postal Service, but was fired "immediately". Id. at 235. However, he alleged that he was subjected to prejudice and after he filed a grievance, the job was restored. Id., 235 - 236, 302. He testified that he worked as a letter sorter from 1982 to 1986. Id., 236. He said that the job was too stressful, and that he developed problems with both wrists. Id. 236 to 238. After he was treated by the Veterans Administration, the wrists became more functional, and he did not have further problems. Id., 238 - 239. He testified that the Postal Service fired him over a dispute whether he could physically work. Id. at 242. He apparently failed to report to his supervisor by telephone. He testified that he was not able to work with his hands at that time. Id., 242, 303.

Meanwhile, while a postal employee, he also tried to establish a recording studio, the Stage of Stars. Id. at 239, 294. He maintained it until 1988. Id., at 239. He termed it as an "investment" rather than a business, " ...because in business you make money." Id. at 239, 294 - 295. He never released any records. Id. at 295. While in high school, he played rhythm and lead guitar, and played in several bands, but was never "successful". Id at 240 - 241, 295. He last worked as a professional musician in 1968. Id,. At 294. He testified that he no longer can play, because of the effects of a crush injury to the left hand that occurred in 1990. Id., 241.

Also during the period of time prior to return to work as a longshoreman, he tried to operate a television repair business. Tr., at 242. He was also unsuccessful in that business. Id.

Mr. Lewis also acquired an insurance salesman's license and worked for Mutual of Omaha and National Standard Life. Tr. at 296. He worked in the industry for four to five years. Id. at 298.

He later worked for Denny's Restaurants, again unsuccessfully, and ".. ended up being homeless." Id. at 243.

At that time, he had emotional problems, and did not "care anymore". Tr., at 243. He said that caring people and God helped him to return to work as a longshoreman at that time. Id.

In 1981, Mr. Lewis was injured in a motorcycle accident, and as a result has had four (4) surgical procedures to the right knee. Tr. at 244. In 1981, he spent two weeks at Cedars Medical Center, and was treated by Dr. William Bacon. Tr at 307, 311.

In 1990, Mr. Lewis suffered an injury while at work as a longshoreman at the Port of Miami a tie rod struck him in the head and jaw, and in the process, he fractured his left hand in two places. Tr, at 245 - 246. It also affected his right knee and low back. Id., 246. He had a restriction to moving the head to the left, causing neck pain. Id. at 267. At that time, he also had loss of memory, loss of balance, headaches, and "possibly my mental state....Every time I have an accident it interferes with my mental state, because I have an idea of becoming disabled." Id., 247. He testified that he has a fear of becoming "disabled". Id. He said that he lost thirty nine weeks of work from that injury. Id. Although he received medical care, he stated that the treatment was incomplete and that he was not satisfied with the medical care he had received. Id. On Cross examination, the Claimant remembered that he was sent to Dr. Guillermo Martinez at that time, and the Claimant remembered that problems with slurred speech, dizziness, popping in the neck and memory loss might stem from psychosomatic sources. Id at 317. He also was reminded that after that accident, he began to have problems with the vision in the right eye. Id at 318. He admitted that it had worsened with time. Id. He was sent for an examination at Bascom Palmer Eye Institute for field of vision deficit. Id.

In April or May 1991, Mr. Lewis returned to work at full duty. Tr., 248.

In 1992, Mr. Lewis had an outpatient operation on the left shoulder, performed by Dr. Bacon at Cedars Medical Center. Tr. at 333.

In 1993, Mr. Lewis injured the middle finger on the right hand when it was caught in a conveyor belt while working at the Port of Miami. Tr., 248 - 249. After about six weeks, he returned to work at full duty. Id., 249.

In 1995 the Claimant's left foot was fractured at work when a container plug weighing about sixteen to eighteen pounds fell on it from a height of about eight feet. Tr., 250 - 251. He lost a little more that two (2) years of work at that time. Id., at 250 He also injured the left knee and low back in that accident. Id., 251 - 254. He was on crutches, and later a cane. Although the Claimant was treated by Dr. Pritchard, there is a dispute whether his treatment was covered by workers' compensation insurance for this episode. Dr. Pritchard performed arthroscopic surgery on both knees at that time. Id. However, the Claimant testified that he recovered and that he returned to work at full duty in January, 1998. Id.

The 1990 and 1995 claims were subject to an Agreed Stipulation that was approved by the District Director, Sixth Compensation District, Department of Labor on July 30, 1997. Ex 1 at 86 to 105. The Stipulation addressed the injuries and complaints concurrent to that time, but the Claimant accepted that he had no restrictions as a result of the two work related accidents. Id.[2]

From January, 1998 to March 26, 2001, the Claimant worked as a full-time longshoreman without medical restrictions at the Port of Miami. Tr. 254 - 255. However, while on a trip to Haiti in 1999, the Claimant injured the left wrist in a fall, and missed three months work in the autumn of that year. Id., 255.

The Claimant testified that his average work day lasted from twelve to sixteen hours of steady work. Tr., 256 - 258. He stated that he earned $74,000.00 in the year prior to accident.

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[2] The Claimant received $90,000 in total benefits and netted $69,000.00 in compensation benefits at that time. Id.

Id., 260. In the year prior to that he testified that he had earned "fifty something"; and in the year prior to that about $48,000.00. Id., 261.

Mr. Lewis presently receives $1049 per month in Social Security Administration benefits and $1200 per month in Union retirement benefits. Tr., 292 - 293.

On March 26, 2001 Mr. Lewis was driving a "mule" towing a "ship lift", a forty foot container, when

> ...all of a sudden all hell broke loose. All I know is that I was thrown inside the vehicle. At the time it happened, immediately I had to find myself because I had felt stars and everything in my head and my eyes...

Tr., 262. He alleges that he was thrown, hitting his head on the ceiling of the cab of the "mule",

> I was thrown into the dash, everything in front of me. I was thrown hard, like somebody going into a concrete wall. That's how I felt.

Id., 262 -263.

The mule was not equipped with a seat belt. Although he was wearing a helmet, he alleges that his head struck the ceiling, and his knees struck the dash, steering wheel, "whatever". Id., 263. In his deposition, the Claimant alleged that he was returning containers from a storage area just after his lunch break, when the "landing gear" to the mule malfunctioned:

> Sometimes a leak occurs and it cause the container to slowly come back down after you done raised it with the fifth wheel. Other times you can try to let it up and you think it s up, it s not up. And it seems like it s going up and it s not because the fifth wheel will not lift the load.

Ex 4 at 52. On cross examination, the Claimant could not remember how long it took him top recover or how fast the mule was going. Tr at 331 - 332. He acknowledged it took only a few minutes to get himself "straight", and that he was able to return to work and to complete his shift. Id, at 331.

Mr. Lewis did not immediately report the incident, but did report it later in the shift. Tr. at 264. He said that the incident occurred after his lunch break at 8:00 p.m., and that he left work at 11:00 p.m. that day, so that he reported within a couple of hours. Id. at 332. Although he did not immediately seek medical treatment, he did ask for it about three days later. Id. He testified that he started to have shoulder pain, but that he kept working. Id. at 265. Later he felt it across both shoulders. Id. In his deposition, the claimant stated....All I know is that when I hit that track and I felt my head hit the ceiling, my knees went into the dash and the steering wheel.

> Q (by Counsel) Both knees?
>
> A Yes. I hit very hard. Felt like stars or whatever, in my eyes or whatever. It s like I was stunned and the vehicle just came to an abrupt halt like I had run into a concrete wall, and I sat there.

Ex 4 at 52 - 53.

He alleges that the person to whom he was supposed to report, "Cabrero", was not at work that day, and although Mr. Lewis tried to leave messages for him, they were not returned. Tr., 266.[3] In the deposition, he stated that another employee witnessed the accident. Ex 4 at 53.

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[3] Note that Eduardo Cabrera signed certain medical authorization forms for prior accidents. Ex 5, at 234.

Also in the deposition, Mr. Lewis stated that he spoke to his boss, Mr. Lehman, about it shortly after it occurred. Ex 4 at 55. The Miami Dade County police were also called and they completed a report. Id., 55 - 56 Moreover, Port security was also notified. Id.

The record also shows that on March 28, 2001, the Claimant completed a "Disability Claim Form" for his union. Ex 5 at 252. In it, when asked when he felt he could return to work, he noted, "never." Id.

On March 27, according to the testimony, Mr. Lewis was painful in the back, the knees and he began to have a headache. Tr. at 266. Mr. Lewis testified that he had suffered pain in the neck area previously, in the 1990 accident, but on that occasion, it was painful to move the head to the left; this time, it was painful bilaterally, more so to the right. Id., at 267.

Mr. Lewis admitted that prior to the incident, he wore wrist supports. Tr. at 304. At one time he had described the wrists as so swollen that he was crippled. Id. at 305. The wrists were diagnosed as arthritic by the Veterans' Administration. Id. 306. In 1986, in his claim against the Postal Service, he alleged that he could not drive a car using his fingers as a result. Id. at 306 - 307.

Mr. Lewis testified that the first physician that he sought post incident was Dr. Pritchard. Tr. at 269. He said that he also told Dr. Boza about the incident at about the same time. Id., 335. However, according to the Claimant, the Employer/Carrier refused to provide him with authorization to receive treatment from Dr. Pritchard until he obtained an attorney. Tr. at 267. Therefore, Howard Silverstein, Esquire, was retained, and he sent the Claimant to Dr. Alan Gordon. Id., 268. In addition, the Claimant alleged that he was having mental problems so he consulted his psychiatrist, Dr. Boza. Id. "He was seeing me less before the accident, but he was seeing me more after the accident." Id.

The record shows that the Employer accepted the accident as compensable and authorized Dr. Gordon as first choice physician. The record shows that the Claimant was paid Temporary Total Disability benefits from March 27, 2001 to August 27, 2001. Ex 21; Tr., 53 - 54. 385. The Employer has not filed a notice to controvert benefits.

The Claimant testified that Dr. Gordon treated him for mental problems, headache, pain and restriction of motion in the left wrist, both knees, and the back (cervical, thoracic and lumbar), and loss of balance. Tr. at 273. He testified that he had never had the back pain previously, but that the neck pain was from a recurring source. Id. Although he initially had pain in the shoulders, Mr. Lewis testified that the pain in the neck is localized. Id. at 275. Although he was treated for low back pain by Dr. Bacon in 1990 and by Dr. Pritchard in 1995, that pain had receded. Id at 276. He asserted that he is in constant pain and that because he is limited to taking only Tylenol, the pain never goes away completely. Id. He testified that at times he needs assistance to get out of bed or to take a bath by himself. Id. at 277. On cross examination, Mr. Lewis acknowledged that while he was in service, he had been treated for a bad back. Id. at 288.

He testified that he has pain that goes from the right hip to the foot. Tr. at 277. He said that the leg becomes completely numb. Id. He also has had pain that shoots from the shoulder down the arm, into the hand. Id., 278. He also alleges constant pain in the knees. Id.

Although no one has prescribed crutches for Mr. Lewis, he uses one prescribed for a 1981 accident. Tr. 278 - 279. He testified that although Dr. Pritchard had prescribed further arthroscopy, the request had been denied by the carrier. Tr. at 279.

Dr. Gordon provided heat treatment and physical therapy. Id. at 270. Mr. Lewis maintains that Dr. Gordon wanted to prescribe medication. However, because the Claimant has a history of reactions to medication, none were prescribed. Id.

Mr. Lewis stated that he was not satisfied with the treatment that he had received from Dr. Gordon. He said that the had wanted to have treatment from Dr. Pritchard, but that the carrier refued his request to authorize him. Tr. at 271. When Dr. Pritchard treated him, he had to use his private insurance. Id. He has not received authorized treatment since he was released by Dr. Gordon on August 28, 2001. Id., 272. He said that he had tried to get treatment at emergency rooms and "they wouldn't even touch me." Between August 2001 and August 2002, the Claimant was not sent to any authorized physician. Id. at 273.

Mr. Lewis has been taking medication for his mental difficulties for a long time. Tr. at 280. He alleges that although he had a problem he was able to work from 1998 to 2001 Tr. at 280 to 281. He alleges:

I'm not able to function as a whole person.

Id., 281. He testified that he is frustrated because he can not take care of himself. He no longer receives respect from his wife. "It's like I'm not in charge. I used to be in charge of my life. ...I want to do things. I can't do things." Id. 281 - 282. He alleges that he is depressed. Id. at 282.

> I feel real bad about what's happening in my head because when I speak to people, ... as though I I want to chew them up and spit them out ....When I talk to people it's like I'm taking it out on the world.

Id. at 283. As a result, he alleges that he becomes withdrawn and antisocial. Id. "...[I}t's like I'm not a man anymore." Id.

In deposition, Mr. Lewis advised that he is in a weekly anger management class. Cx 4 at 92.

The record also shows that as of August, 2002, when he was deposed, Mr. Lewis was taking sixteen (16) prescribed medications on a daily basis, and was also prescribed two others on an as needed basis . Ex 5, 259 - 61.He has had surgery to the left wrist, a history of carpal tunnel bilaterally and is also status post surgery to the left shoulder, all prior to the incident. Among the other impairments that Mr. Lewis has received treatment are a cardiac condition, esophogeal reflux, skin disorders, status post splenetic hematoma, sleep apnea,[4] hearing disturbances,[5] high

[4] See report of Charles Z. Weingarten M.D. and Thomas Kehoe, M.D., December 24, 2001 on referral from Dr. Forster, Ex 5, at 275.

[5] An audiogram dated April 12, 2002 showed that the Claimant has a deficit to the left ear. Ex 5 at 276. Ex 19. This was done under the direction of Dr. Clifford Foster.

blood pressure, hemorrhoids[6] hepatitis "A"[7], a hiatal hernia[8], chronic urticaria[9], allergies[10], chronic rhinitis[11], and mental problems. He also has had possible mixed hyperlipidemia, scabies, pruritis, and possible herpes. See Veterans' Administration records, Ex 10. Prior to the incident, James Spall at the VA, noted that the Claimants hands were dysfunctional, due to status post injuries and status post surgery. Id. at 225 - 229. At times, he had said that he needed wrist splints due to loss of control and spasm. Id. at 232, 234. At times, a trace of edema on both legs is noted post incident. Id, 53. These records show a history of mental problems requiring occasional hospitalization. From October, 1996 to April, 1997, he was an inpatient at the hospital's residential psychiatric treatment program. On discharge, Haldol, Cogentin, and Ativan were prescribed. Ex 10 at 7 - 12.

After his release from the hospital, the Claimant improved remarkably. Id at 262 - 273. During this time he was treated by Dr. Boza with aid of Dr. Burda, a psychologist. However, the Claimant began to have intermittent deterioration. On December 8, 1999, Dr. Boza noted that the Claimant was still doing well, with a GAF of 60.[12] Id at 261. On April 27, 1999, the Claimant was

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[6] He had a colonoscopy on June 4, 2001. Id, 24.

[7] See Ex 10 VA records.

[8] Id at 113, June 4, 2001 by Vikas Kurana, M.D.

[9] Id.

[10] Id.

[11] Id .

[12] Global Assessment of Functioning (GAF) Scale (DSM - IV Axis V)

Code	Description of Functioning
91 - 100	Person has **no problems** OR has superior functioning in several areas OR is admired and sought after by others due to positive qualities
81 - 90	Person has **few or no symptoms**. Good functioning in several areas. No more than "everyday" problems or concerns.
71 - 80	Person has symptoms/problems, but they are **temporary, expectable reactions to stressors**. There is no more than slight impairment in any area of psychological functioning.
61 - 70	**Mild symptoms in one area** OR difficulty in one of the following: social, occupational, or school functioning. BUT, the person is generally functioning pretty well and has some meaningful interpersonal relationships.
51 - 60	**Moderate symptoms** OR moderate difficulty in one of the following: social, occupational, or school functioning.
41 - 50	**Serious symptoms** OR serious impairment in one of the following: social, occupational, or school functioning.
31 - 40	**Some impairment in reality testing** OR impairment in speech and communication OR serious impairment in several of the following: occupational or school functioning, interpersonal relationships, judgment, thinking, or mood.
21 - 30	**Presence of hallucinations or delusions which influence behavior** OR serious impairment in ability to communicate with others OR serious impairment in judgment OR inability to function in almost all areas.

noted to have a GAF of 50. However the note advises that Dr. Boza was not sure whether the Claimant could remain functional. Id. at 269. On June 15, 1999, Dr. Boza noted that the Claimant was compliant with his medications and was doing well. Id at 255. On June 24, 1999, the Claimant was admitted to the VA. While he was there, he was seen by Dr. Boza. Id 249 - 254. In a letter dated August 23, 1999, Dr. Boza described Mr. Lewis as suffering from paranoid schizophrenia under "partial" control. Id at 230. On September 27, 1999, Mr. Lewis consulted with Dr. Boza. He was having difficulty bringing his wife to this country and was described as paranoid and suspicious. Dr. Boza opined that Claimant's GAF was 45 at that time. Id., 224. On January 18, 2000, the Claimant was seen by Dr. Boza. Dr. Boza determined that the Claimant had a GAF of 40 at that time. Id. at 215 - 217. On March 21, 2000, the Claimant complained about his inability to cope due to problems with his family. Dr. Boza rendered an opinion that the Claimant had a GAF of 40 and that the Claimant was totally and permanently disabled. He opined that suspiciousness probably kept the Claimant from earlier treatment. Id. at 197 - 199. On April 6, 2000, the Claimant called Dr. Boza to make sure he was taking his prescribed medications properly. Id at 195. On April 27, 2000, the Claimant advised Dr. Boza that he had a lot of stress at home due to cultural differences with his wife. Dr. Boza determined that his GAF was 45. Dr. Boza noted that the Claimant was tired and run down. Id. 191 - 193. On May 30, 2000, the Claimant reported he had hives. He was examined by Dr. Boza and found to be emotionally stable at that time. His GAF was 55. Id at 187 - 189. On August 1, 2000, the Claimant reported to Dr. Boza that he was able to deal with home and work. Id at 168 -170. Dr. Boza described the Claimant as in "moderate" control. Id. On October 3, 2000, the Claimant complained of severe chronic pain and paranoia because of a work related injury. Id at 156. On November 21, 2000, the Claimant was treated at the VA for psychiatric deterioration by Dr. Boza. On that date, a GAF of 45 is noted. Id. at 143 - 145. On December 12, 2000, the Claimant complained to the VA that he had a choking sensation. Id at 141. On December 18, 2000, the record shows that the Claimant was treated at the VA, but for colon and other systemic body complaints. Id. 134 - 140.[13] On January 2, 2001, the Claimant had he alleged two episodes of what he thought was mucus causing a choking sensation, was treated and released. Id. 132[14]. On February 13, 2001, the Claimant burned his arm on a car radiator and went to the VA for treatment. Id at 128.

The incident in question occurred on March 26, 2001. On March 28, 2001, the Claimant went to the VA for treatment due to difficulties in his marriage and work. On that date, Dr. Boza noted that the Claimant was decompensating and may have needed hospitalization. He gave the Claimant a GAF score of 42.Ex 10 at 126 - 127. On March 29, 2001, the Claimant complained to

11 - 20	There is **some danger of harm to self or others** OR occasional failure to maintain personal hygiene OR the person is virtually unable to communicate with others due to being incoherent or mute.
1 - 10	**Persistent danger of harming self or others** OR persistent inability to maintain personal hygiene OR person has made a serious attempt at suicide.

[13] James Spall was the attending physician.

[14] Nancy Klimas, M.D., was the attending physician.

the VA that he had been experiencing anger and suspiciousness and requested treatment. Id at 124. The record reflects that the Claimant went to the VA Hospital on March 29, 2001, when he was interviewed by a psychologist, Philip Burda, Ph.D. The note states in part:

> He reported that he was experiencing a lot of anger and suspiciousness recently. He admitted that he continues to have auditory and visual hallucinations but said that he is generally able to ignore them. He said that he does feel sad at times but denied current problems with depression. He said that he has become increasingly irritable and isolated. This has created problems with his wife, Margaret, and child, Clifford, who is seven years old. He said that he does not communicate much with his wife, and becomes angry when they try to talk to him and interact with him. He said that he also becomes irritable whenever he is around other people or loud situations, such as riding a bus. He has worked as a longshoreman and is retiring because of the stress of the job and conflicts with his co-workers. He said that he is applying for disability. He is currently seen as an outpatient in the Mental Hygiene Clinic and followed by Dr. Boza. His wife and son were present for the interview and confirmed that he is frequently angry and withdrawn, and this has created serious problems for the relationship. He. is also suspicious of his wife, particularly over financial issues, and he tries to control the relationship with her. She is relatively isolated because her friends and family live in Haiti, and she does not speak much English. He admits that these problems have created major problems for him, and he seems motivated and appropriate for treatment. He will be admitted on Monday, April 9, 2001 to the program [referring to a VA program].

Ex 2 at 76, Ex 10 at 124.

On April 6, the Claimant advised the VA that he had been in an accident at work and was in physical therapy and could not maintain appointments in an out patient therapy program. Ex 10 at 123. On April 26, 2001, Dr. Boza noted that the Claimant is totally disabled from paranoid schizophrenia, as he was tense, paranoid, delusional, and suspicious. Id at 114. He was on crutches and complained of pain. Id. On June 18, 2001, the Claimant is noted to suffer from a psychosis but is also noted by Dr. Haleh Backshandeh to have been emotionally stable. Id. at 108 - 111. On July 24, 2001, Dr. Boza recorded a GAF score of 42[15], on January 3, 2002 the GAF was noted as 42[16], on March 5, 2002, the GAF was reported as 47[17], on May 28, 2002, the GAF was 42. Id. 50. Post traumantic stress disorder was diagnosed by Dr. Boza on July 24, 2001.Id. at 99 - 102. Post incident, the record shows that Mr. Lewis received out-patient group therapy treatment for a mood disorder and anger management. Ex 10, 18.21, 29 -31, 33- 43, 50 - 53, 54, 56 - 58, 61 - 62, 67 - 68, 77 -9, 86 - 87, He also had a sleep study. Id at 15 - 16, 20, 22 - 23, 45-47.

In addition to complaints of recurring pain in the knees, the Claimant has had treatment for lower abdominal and chest pain post incident. Id.

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[15] Id. at 88 - 102.

[16] Id. at 89 - 92 by Dr. Boza.

[17] Id at 74 - 76 by Dr. Boza.

On cross examination, the Claimant admitted that he is able to bathe himself and that he has no help in performing his daily activities. Id., 337. Mr. Lewis also acknowledged that he had been hospitalized on three occasions after 1990. Tr. at 320. He could not remember the exact dates or the reasons for the hospitalizations, but he spent six (6) months in the VA hospital in the period 1996 to 1997. Id., 120 - 121. The Claimant remembered that he had been examined by Dr. Toby Berman but could not remember who may have treated him prior to Dr. Boza. Id, 322.

The record also shows that the Claimant was sent for MRI studies on the neck, back and knees in May, 2002 by Dr. Pritchard, and these were performed by Dennis Arena, M.D., who submitted reports on May 8 and May 10, 2002. Cx 2,Ex 14, Ex 5, 394 - 406, Ex 6 at 378 - 402,.[18] In the neck, Dr. Arena reported a loss of normal cervical lordosis which may be secondary to muscle spasm or sprain or tearing of the posterior intraspinous ligaments, mild posterior bony spurring with associated posterior bulging of the intervertebral disk at the C3-C4 level causing anterior impression on the thecal sac. Also noted were mild posterior bony spurring with-associated posterior bulging of the intervertebral disk at the C4-C5 level causing anterior impression on the thecal sac. The report stated that there is a superimposed broad-based left posterolateral herniated nucleus pulposus causing additional anterior impression on the thecal sac that is contiguous with the left side of the spinal cord. Mild left neural foraminal encroachment as well. Posterior bony spurring with associated posterior bulging of the intervertebral disk at the C5-C6 level causing anterior impression on the thecal sac and moderate bilateral neural foraminal encroachment. Id .

In the thoracic area, an expansion of the left neural foramen revealed a "probable" meningeal cyst at T3-T4 and a small posterior herniated nucleus pulposus at the T5 - T6 and T6-T7 levels just to the left of midline causing anterior impression on the thecal sac. In the lumbar area, Dr. Arena noted a loss of the normal lumbar lordosis "this may be secondary to muscle spasm." He noted a partial desiccation of the intervertebral disk at L3-L4 with loss in disk height.

> There is diffuse posterior bulging of the intervertebral disk causing anterior impression on the thecal sac. There is hypertrophy of the interarticuiar facet. There is no significant spinal stenosis. There is moderate bilateral neural foraminal encroachment that was also pre sent on the prior examination.
>
> At the L4-L5 level, there is partial desiccation of the intervertebral disk with loss i ct disk height. There is diffuse posterior bulging of the intervertebral disk causing anterior impression on the thecal sac. There is a superimposed central and left posterior herniated nucleus pulposus causing additional anterior impression on. the thecal sac. There is hypertrophy of the interarticular facets. There is rio significant spinal stenosis. There is moderate bilateral neural foramiflal encroachment. Bulging disk .. was present on the prior examination.
>
> At the L5-S 1 level...there is moderate bilateral neural foraminal encroachment.

Id.

In the left knee, a small joint effusion was noted, with "moderate" patella chondromalacia regarding the medial facet. particularly and there was an appearance of line oblique tear to the

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[18] The citations are to Ex 5 for reference, because the pages in Cx 2 are not numbered. However, all of the records attached to the deposition are the same.

posterior horn of the medial menjscus with communication at the inferior artjcular surface. He noted, "However, it should be noted that post-surgical changes may appear similar." Id at 400.

In the right knee, a similar patella chondromalacia was found, but a small area of osteonecrosis at the medial artjcular surface of the medial femoral condyle.

> Osteoarthritic changes at the medial code partment including chondromalacia and medially extending osteophytes. There is truncation of the ante rior horn, body, and posterior horn of the medial mlniscus which appears to be post-surgical, although extensive tears can appear similar. Osteoarthritjc changes at the lateral compartment, including chondromalacia and laterally extending osteophytes. small remnant of lateral meniscus also appears to be post-surgical, although extensive tears can appear similar.

Id.

These findings are accepted by all parties, but the opinions regarding medical causation are accepted by the treating physicians and discounted for the most part by the Employer/Carrier experts. The Claimant had a battery of X-rays of the knees taken at Cedars Medical Center in December, 1999. Cx 5, at 409 - 410. Dr. Gordon also took a battery of X-rays on June, 11, 2001. Id, Ex 6 at 282 - 286.

The Claimant also had an MRI of the eyes at MRI of South Broward on June 17, 2002 performed by Matthew Kay, M.D. Ex 7.This showed a volume loss of the optic nerve of the right eye, which is, according to the report, consistent with optic atrophy and gliosis.

The Claimant presented deposition testimony from Alen E. Gordon M.D.(Cx 1), Rowland Pritchard, M.D.(Cx 2, Ex 5), Ramon Boza, M.D.(Cx 3), Bruce Kohrman, M.D. (Cx 4), Sulim Krimshtein, M. D., and Harry Hamburger, M.D.(Cx 5) Besides Dr Herskowitz,, the Employer/Carrier presented deposition testimony from Peter Millheiser, M.D.(Ex 35), Dr. Henry Trattler, and Anastasio Castiello, M.D. (Ex 33). The Claimant was also examined by Jeffrey S. Beitler, M.D., Henry M. Storper, M.D., Henry Trattler, M.D., and Bonnie Levin, Ph.D. Mr. Lewis also testified that he also saw Dr. Cliford Forest, about four or five times due to dizziness and loss of balance. Ex 4 at 54. He has been told that he has damage in the left ear that adversely affects his balance. Ex 54 - 59. He also was treated by Matthew B. Kay, M.D., another neuro-opthamologist, and Joel Glazer at Bascom Palmer Eye Institute. Ex 4 at 64 - 74. The Claimant was also treated by Drs. James Spall, Curt Olesen, Jeffrey Lebow, Nancy Klimas, a Dr. Bakshandeh, a Dr. Chirinos, a Dr. Martinez- Debouchet and Theodore Struhl, M.D., who saw him approximately five times post accident Ex 4 at 81 - 83, 92 - 93. He also has been treated by Philip Samet, M.D., a cardiologist. Id at 84 - 85. He also had an evaluation of his hearing at Miami Hearing and Speech Center, under the responsibility to Dr. Clifford Foster on April 12, 2002. Ex 19.

During the course of the hearing, the Claimant used an electric wheel chair. He testified that the Veterans Administration had awarded him the chair in December, 2002. Tr. at 292. He testified that he needs to use it all of the time. Id.

On cross examination, Mr. Lewis acknowledged that he would not seek future employment. Tr at 334. He said the he wished that he were able to work. Id.

Dr. Gordon

Dr. Gordon is an orthopedic surgeon who testified by deposition on February 12, 2003. Cx 1. His office notes and other medical records are at Ex 15. The treatment was authorized by the Employer/Carrier, and all charges have been paid. On initial examination, Dr. Gordon noted the following:

> Cervical spine: The patient has tenderness of all cervical spinous processes. The patient has a surgical scar on the superior surface of the left shoulder. This appears to be well healed. The patient indicates the right shoulder as the area which is painful. He has spasm and tenderness of the trapezius muscle in the right shoulder. Active cervical spine motion is restricted in each direction to about ‘75% of normal. The restriction is due to stiffness. Sensation and motor power in the upper extremities are within normal limits.
>
> Lumbar spine: The patient comes to our office wearing a knee cage on the right knee and using two axillary crutches. The patient walks with difficulty. He is able to flex his spine so that the fingertip reaches to mid-tibia level. He has a 30% loss of lumbar side - bending, extension, and rotation. The patient has tenderness of all lumbar spinous processes. He has spasm of the lumbar paravertebral musculature. Reflexes in the lower extremities are symmetrical. The straight-leg raising test is positive in both legs at thirty degrees. Sensation in the legs are within normal limits.
>
> Right knee: The patient s knee cage was removed for examination. The patient has no swelling of the right knee joint. There is patello—femoral crepitus present. Tests for medial and lateral collateral ligaments reveal that they are intact. The McMurray test is negative. Testing the anterior and posterior cruciate ligaments are within normal limits. The patient has a full range of extension of the right knee joint. Complete flexion lacks thirty—five degrees. There is good strength of extension.
>
> Left knee: The patient does not wear any orthosis on this knee. The patient has no point tenderness present. There is no effusion or synovial thickening present. Testing the medial and lateral collateral ligaments reveals no abnormal laxity. Testing the anterior and posterior cruciate ligaments reveals no abnormal motion. The McMurray test is negative. The patient has a loss of flexion of the left knee by forty degrees. There is a full range of extension. The patient has good quadriceps strength.

Cx 1 at 8 - 11; also see report dated April 9, 2001, attached to deposition and Ex 15 .

Initially, the Claimant’s diagnosis was:

1. Cervical spine sprain.
2. Right cervical radiculitis.
3. Lumbar spine sprain.
4. Acute sprain of the right knee joint.
5. Chondromalacia right patella.
6. Acute sprain of the left knee joint.
7. Chondromalacia left patella.

Cx 1., 11

Dr. Gordon stated that he had been authorized by the carrier to treat Mr. Lewis. Id. Initially, he had not been authorized by the carrier to take x-rays. Id at 14. On April 2, hydrocolator packs, diathermy and electrical stimulation were administered. Cx 1, at 12. At the time, the Claimant was placed in temporary total disability status. Id. at 13. On April 9, April 23,

and May 7, x-rays were taken, on May 14, the Claimant was making satisfactory progress. Cx1, at 16. X-rays were taken at Parkway Regional Medical Center on June 11, 2001. Ex 16. On August 1, Dr. Gordon prescribed a brace for the left knee, August 10, and the record noted that Mr. Lewis still had pain, limitation and restriction of motion in the cervical and lumbar spine, and had pain and trouble ambulating due to knee problems. Cx 1 at 16 - 17.

On August 16, 2001, Dr. Gordon determined that the impairments achieved maximum medical improvement and he released Mr. Lewis with the following diagnosis:

Cervical spine sprain.
Right cervical radiculitis.
Cervical spinal osteoarthritis.
Lumbar spine sprain.
Acute sprain of the right knee joint.
Chrondromalacia right patella-femoral joint.
Osteoarthritis of right knee joint.
Acute sprain of the left knee joint.
Chrondromalacia left patella—femoral joint.

See reports attached to Cx 1. He determined:

> As the patient has reached maximum medical improvement, I feel that he is left with the following permanent disabilites: As a result of his cervical injury, 3% of the whole body. As a result of his lumbar spine sprain, 3% of the whole body. As a result of the injury to the right knee, 10% of the right knee. As a result of the injury to the left knee, 5% of the left knee. If all of these disabilities were to be combined, he would have an overall total disability of 10% permanent disability of the whole body.

Id. Also at Ex 5, at 289.

On November 6, 2002, Dr. Gordon re-examined the Claimant and reviewed reports that included MRI studies. Dr. Gordon testified that the final diagnosis of Mr. Lewis's injuries were as follows:

C-4 to C-S disc herniation, right cervical radiculitis, cervical spinal osteoarthritis,
T-5 to T-6 disc herniation,
T-6 to T-7 disc herniation,
L-4 to L-5 disc herniation,
acute sprain of the right knee joint, chondromalacia of the right patella-femoral joint, osteoarthritis of the right knee joint,
acute sprain of the left knee joint and chondromalacia of the left patella femural joint.

(Cx 1 at 18).

Dr. Gordon testified that all of these injuries were as a direct result of the March 26, 2001 accident. (Id. at 19). Dr. Gordon testified that these injuries resulted in a whole body impairment of forty per cent (40%) in accordance with the AMA Guides to impairment (5th edition). (Id. at 21-23).

Dr. Gordon placed Mr. Lewis on a no work status due to the severity of his injuries. (Id. at 26). Dr. Gordon opined that Mr. Lewis is now completely unable to return to work in any capacity on a permanent basis and is permanently and totally impaired. (Id. at page 25 and 26).

Attached to the deposition transcript are physiotherapy notes showing that Mr. Lewis was provided fifty six (56) sessions.

On cross examination Dr. Gordon acknowledged there was normal sensation and motor power in the upper extremities and that usually rules out nerve damage. Id at 32. No atrophy was noted. Id at 33. Normal reflexes were noted. Id. Because Mr. Lewis did not complain about it, Dr. Gordon did not examine the thoracic spine. Id. at 34. Dr. Gordon also acknowledged that there were many pre-existing impairments. Id at 35 to 37. He noted that there was a dessication of the disk at L4 to L5, but admitted that he did not know what the medical cause may have been. Id at 37. He admitted that bulging disks may be a "normal" finding. Id at 38. He admitted that all of the findings he noted may be a result of degenerative changes. Id. at 39 - 41 In his report dated August 16, 2001, Dr. Gordon gave the Claimant a ten (10) per cent rating, but increased it after reviewing the MRI and other report. Id at 44 - 52.

According to the Claimant, the reason that Dr. Gordon discharged him was because of a dispute over a letter that the Claimant had sent to him, asking for a copy of his records. Ex 4 at 78 - 79. According to the Claimant, he was not happy with the treatment he was receiving and they had conflicts over the regimen, the nature of the treatment and Mr. Lewis was skeptical whether his records were being accurately kept. He said that Dr. Gordon told him,

We're going to take care of you, Sir.

He alleges that he was sick at the time and still needed treatment. Id at 80.

Dr. Pritchard

Dr. Roland Pritchard is a board certified orthopedic surgeon. Cx 2 and Ex 5 at 3.[19] Dr. Pritchard treated Mr. Lewis from November, 1995 through May 15, 2002. Cx 2 at 5 - 6. Dr. Pritchard initially treated Mr. Lewis for the 1995 work related accident when the fuel plug fell on Mr. Lewis's left foot resulting in injury to his left foot, left knee and lumbar spine. (Id., 5-6 and 24). By January 19, 1996, Dr. Pritchard opined that Mr. Lewis s lumbar spine had completely healed, and that he had a 0% permanent impairment and could return to work full duty, relating to the lumbar spine. (Id. at 9 and 12). Dr. Pritchard performed arthroscopic surgery on Mr. Lewis's left knee on March 14, 1996 and on the right knee on May 28, 1996. (Id., 7-10). As of October 23, 1996, Dr. Pritchard concluded that the low back injury was completely healed with a 0% impairment. (Id. at 12). Next, Dr. Pritchard treated Mr. Lewis for a left wrist fracture (Id. 14), which completely healed by April, 1999. (Id., 15). By April 24, 2000, Dr. Pritchard determined that Mr. Lewis was able to continue working at full time, full duty as a longshoreman with no restrictions. (Id., 17).

On March 28, 2001,two days after the incident, Dr. Pritchard was provided with a detailed history of the accident and evaluated Mr. Lewis and placed him on a no work status. (Id. 18 -20). His office note, attached to the deposition states:

> The patient states that he was working as a longshoreman at the port of Miami and a truck which he was driving, got caught in a rail mechanism on the ground and he was thrown

[19] The deposition is also found at Ex 5. However, all citations in this section are to Cx 2, as the pagination is not exactly the same. The records from Dr.Pritchard are also found at Ex 6.

> forward in the truck, sustaining direct contusions to both kneecaps when they struck the dashboard of the vehicle.
>
> The patient, who has been treated for post-traumatic arthritis of his knees and has undergone arthroscopic surgery of both knees performed by myself back in 1997, then developed subsequent increased pain and swelling in the knees.
>
> When seen today, the patient is noted to have mild effusions of both knee joints with patella femoral grating as the knees are ranged through flexion and extension and moderate discomfort on manipulation of the patella femoral articulations, more so on the right knee than on the left knee.
>
> Range of motion of the knees is mildly restricted and on flexion there appears to be reasonable stability of the cruciate and collateral ligaments on testing.
>
> The patient is ambulating with crutches, partial weight bearing on the right leg because of his discomfort.

Id.

Dr. Pritchard testified that Mr. Lewis probably exacerbated arthritic conditions in the cervical, thoracic and lumbar spines, presumably creating new disc problems in those areas, and that he exacerbated pre-existing conditions in both knees when his knees struck the dashboard. (Cx 2 at 25). Dr. Pritchard testified that the history of having been thrown upwards, striking his head against the metal roof, is the kind of force that could have caused disc herniation in the cervical spine. (Id., 26). Dr. Pritchard testified that, within a reasonable degree of medical probability, the cervical disc herniation was caused by the March 26, 2001 accident. (Id. at 31). Dr. Pritchard also stated that the accident caused the lumbar disc herniation. (Id.,30-32). Dr. Pritchard testified that accident also resulted in an aggravation of the preexisting injuries to both knees, resulting in a need for arthroscopic surgery to both knees, and caused an acceleration of the arthritic process resulting in the accelerated need for Mr. Lewis to undergo a total knee replacement. (Id.,32-34). Dr. Pritchard felt that Mr. Lewis cannot return to work as a longshoreman as a direct result of these injuries. He also opined that his likelihood of returning to any type of work is minimal. (Id. at 34). Dr. Pritchard testified that the injuries resulted in a permanent impairment rating of nineteen to twenty per cent (19 to 20%) to the body as a whole, in accordance with the AMA Guides to permanent impairment (5th edition). (Id. at 35-36).

In office notes attached to the deposition transcript dated May 10 and May 15, 2002, which refer to MRI scans, the following is noted:

> The patient is seen in the office today for follow up of his bilateral knee MRI scans and the scan of his cervical spine. The knee scans... suggested advanced grade IV chondromalacia of the patella femoral articulation of the right knee with an area of suggested osteonecrosis in the medial articular surface of the medial femoral condyle. There is thinning of the cartilage within the medial joint space compatible with post-traumatic chondromalacia. The menisci show post-surgical changes.
>
> MRI scan of the left knee suggests the possibility of a recurrent tear of the posterior horn of the medial meniscus with post-traumatic chondromalacia of the patella femoral articulation.
>
> The MRI scan of the patient's cervical spine suggests a condition of cervical spondylosis throughout the cervical area from C3 to C6 but with a superimposed broad-based

> posterior lateral disc hemiation causing compression of the thecal sac at the C4-5 level with mild neuroforaminal encroachment at that level as well. At the C5-6 level, posterior bulging of the intervertebral disc associated with spurring of the facet joints causing moderate bilateral neuroforaminal encroachment.

On cross examination, Dr. Pritchard acknowledged that he was not aware that Dr. Bacon had determined that Mr. Lewis had received a rating of ten (10) per cent for an earlier neck injury. Id at 40. At that time, the Claimant had cervical spine narrowing at C5 to C6. Id at 42. He admitted that he had prescribed a cervical collar for Mr. Lewis in September, 1996 and he was seen by Dr. Pritchard wearing a collar in an office visit in May, 1997 and also in December, 1999. Id. at 40 - 47. He was also referred to documents showing that the Claimant had lumbar complaints, wrist complaints mental complaints as well as knee problems prior to the March 26, 2001 incident. Id., 46 - 52. He also acknowledged that Mr. Lewis is sometimes given to exaggeration. Id.

Dr. Boza

Dr. Boza is a board certified psychiatrist who has worked at the VA Hospital for 29 years. Cx 3 at 3.[20] He saw Mr. Lewis on a regular and consistent basis both before and after the March 26, 2001 incident. (Id. at page 4). The incident aggravated a preexisting psychiatric condition. Id., 6, 11, 16, 22, 25. He testified that Mr. Lewis has become more depressed, hopeless and helpless since this incident, and that he received an additional diagnosis of post traumatic stress disorder. (Id. at 8-9, 38). Prior to the incident, the Claimant had exercised "moderate" control. Id. at 38. He acknowledged that an underlying preexisting condition of paranoid schizophrenia is overlaid by a post traumatic stress disorder. Id., 6,11, 25- 26. This made him angry at other physicians and lawyers. Id. at 26. The diagnosis of post traumatic stress was added in July, 2001 based on the following:

> It was based on his withdrawal. He was very withdrawn, very withdrawn. His repetition of the incident over and over and over again. No flashbacks per se, but very repetitive. And very difficult to take him off the subject. I would be asking him about his marriage and his son or something. He would go back to what happened and how unfair the professional people; lawyers and orthopedics has been with him.

Id. at 26 - 27.

Dr. Boza testified that within a reasonable degree of medical probability and/or certainty, the March 26, 2001 incident caused the post traumatic stress disorder and the worsening of Mr. Lewis psychiatric conditions. (Id. at 10-11). Dr. Boza testified that Mr. Lewis is now totally disabled as a result of the worsening of his psychiatric condition. (Id. at 11).

However, on cross examination, Dr. Boza could not clearly establish that Mr. Lewis explained what had occurred on March 26, 2001. He could not identify whether or not the Claimant had "relived" the incident. He noted no flashbacks. However, he noted that Mr. Lewis is a "compartmentalized" person and had several other treating physicians and was very wary. Id. 23. He was suspicious of other physicians and lawyers. Id. at 26.

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[20] A copy of the deposition is also contained at Ex 2, at 2 - 42. Becauise the pagination is different, references are made to the Cx version..

Dr. Storper

Dr. Storper saw Mr. Lewis on November 9, 2001 for the Claimant's union. Cx 10. Dr. Storper took a detailed history from the patient and performed a mental status examination. He concluded that:

> At the present time, this patient is suffering from many symptoms of chronic schizophrenia, paranoid. type. This leads to impaired judgement, conflict with other people and places him at risk to act on his above noted impaired judgement in my professional opinion, this patient is currently disabled from all employment. I feel that more aggressive treatment can be offered to him and that he should be seen more often by the Veterans Hospital and other changes in his medications dosage may also be indicated.

(Id. at 5).

Dr. Beitler

Dr. Beitler also examined the Claimant for his union, on January 3 and January 15, 2002. Cx 11.. Dr. Beitler noted that Mr. Lewis worked from January of 1998 to March 26, 2001, full time, full duty as a longshoreman. (Id. at l). He was asked to render an opinion whether the Claimant was capable of performing past relevant work. After reviewing a "plethora" of medical records, taking a detailed history from Mr. Lewis and performing his own physical evaluation, Dr. Beitler concluded that Mr. Lewis was unable to work as a longshoreman:

> Firstly, his right knee is a knee that is probably going to require either fusion or replacement in the future, with the X-ray the way it is, and the condition of his knee being maintained in a brace for stability, as confirmed through his review of records and history given to me by him. . . . He has disability without any specific expected change in the foreseeable future as regards to medical management which makes his neck and knee less stiff and he remains with inability to work at this time until these problems are resolved, which is highly unlikely even with the major surgery because of the interplay on one upon another. His multiple other complaints together, his back complaints, his wrist problems, his problem with optic atrophy and his long list of multiple medications that he takes, suggest that even if he did. not have the essential problem, that is the musculo-skeletal problem of the knee problem disabling him from being a longshoreman, he probably would be disabled on the basis of other medical causes and reasons.. . . The patient, in my opinion, without any doubt, is not able to work as a longshoreman any further in his life."

Id., 3.

Dr. Krimshtein

Dr. Krimshtein is board certified in physical medicine and rehabilitation. Cx 6 at 3.[21] He performed an examination on April 18, 2002, on referral from Mr. Lewis' former attorney. After examining the Claimant's ranges of motion, he noted spasm in the neck. Id at 15. Dr. Krimshtein concluded that, as a result of the accident, Mr. Lewis is suffering from multiple mental and physical problems in the areas of his cervical and lumbar spine and both knees, which have caused him to be totally unable to return to work in any capacity. (Cx 6 at 15-16, 30, 35, 39, 42). Dr.

[21] Office notes are found at Ex 9.

Krimshtein concluded that Mr. Lewis had reached maximum medical improvement by the evaluation date and was left with a 25% impairment as a result of the using the AMA Guides (5th edition). (Id. at page 16-17). Dr. Krimshtein opined that Mr. Lewis will require ongoing palliative care and treatment in the form of physiotherapy and, most likely, total knee replacement. (Id. at 17-18). He estimated that necessary physical therapy will cost the Claimant one thousand five hundred dollars ($1500.00) to two thousand dollars ($2000) per year. Id. at 17. He testified that physiotherapy would stabilize him and help him tolerate pain. Id at 29. He determined that the Claimant is not employable. Id at 31. He opined that the Claimant can not tolerate even a sedentary job. Id.

Dr. Krimshtein acknowledged that he did not have the benefit of the entire record and have a complete medical history when he rendered his opinions. Id at 8 - 11. He also noted that the reason that the Claimant was given fifteen percent (15%) of the body as a whole was based on the premise that the Claimant can not ambulate without an assistive device Id at 20 to 26. In essence, the rating otherwise would be a total of ten per cent (10%) for the cervical and lumbar regions. Id. 26 - 27. He attributed this to myofacial problems that were not pre-existing and which constitute the ten per cent (10%) impairment. Id at 28. He advised that the pre-existing impairments were degenerative, and that any treatment for the degeneration should not be related to the accident..

Dr. Kohrman

Bruce Kohrman, M.D. is a board certified neurologist who has a sub-specialty in neuro-ophthalmology. See cirriculum vitae, attached to Cx 4. Dr. Kohrman testified by deposition. Cx 4. Dr. Kohrman, who examined the Claimant on a referral from his attorney (Id. at 56), reviewed all of the medical records in this case, took a detailed history and performed his own physical evaluation of Mr. Lewis on October 25, 2002. On examination, tenderness was reported in the cervical and trapezius muscles, and at the cervicocranial junction, with mild bilateral mid to upper cervical paraspinous muscle spasm. Neck motion was reported to be limited to about 20 - 25% of full in all directions by pain. Tenderness and muscle spasm bilaterally was also reported in the thoracic paraspinous muscles. And tenderness and muscle spasm was found bilaterally in the lumbar paraspinous muscles. Straight leg raising is noted to 40 degrees bilaterally in the supine position.

The neurological examination: was as follows:

> Mental Status - Normal, with intact memory, language and attention. Cranial Nerves — Smell intact to coffee. Visual field testing in the right eye shows marked constriction, and is normal in the left eye to finger counting. Pupils are 5 mm (they were dilated this morning at Dr. Hamburger s office) and there is a 1-2+ right afferent pupillary defect present. The right optic disc is flat and pale from 3 o clock to 11 o clock. The left optic disc is flat and pink. The face is symmetric with intact sensation. Hearing, phonation, palate and tongue movements are normal. Motor — No arm drift or tremor. Tone, strength and dexterity are intact, with movements made slowly because of pain in the arms. Sensation — Intact to pin, touch, vibration and position. Romberg negative. No spinal sensory level or sacral sensory loss. Coordination — No ataxia of the arms or legs. Gait is moderately slow and antalgic. He cannot tandem walk. Romberg negative. Reflexes

- 1+ at the right biceps, 2+ at the left; 1+ at both triceps; 2+ at the knees and ankles. Plantars are flexor bilaterally.

Id. at 12 - 14 and report attached to Cx 4.

Comparing 1996 MRI studies with 2002 studies, Dr. Kohrman rendered a diagnosis of post traumatic headaches, (probably cervicogenic), traumatic cervicalgia, cervical sprain with MRI documented C-4 to 5 disc herniation (with no prior history or documentation of preexisting cervical disc herniation), traumatic thoracic sprain with MRI documented T-5 to 6 and T-6 to 7 disc herniation (with no prior history or documentation of preexisting thoracic disc herniation), traumatic exacerbation of preexisting lumbar sprain of L-4 to 5, with disc herniation (prior lumbar spine MRI report indicated only disc bulging at L-4 to 5 where there is now a new disc herniation), post traumatic vestibulopathy, documented by an electronystagmogram performed on April 12, 2002 (with a pre-accident electronystagmogram of 1991 read as normal), post traumatic exacerbation of preexisting field loss of the right eye, antalgic gait disorder, post traumatic exacerbation of depression and psychiatric illness and post traumatic exacerbation of preexisting of orthopedic problems with the knees and left wrist, and sleep apnea. (Id. at 17-18). Dr. Kohrman testified that all of those diagnoses, with the exception of the sleep apnea, were directly and causally related to the March 26, 2001 incident. (Id. at 19). Dr. Kohrman felt that Mr. Lewis would be unable to return to work as a longshoreman, and that he would have significant problems returning to any occupation, particularly, one that involves any significant degree of physical activity. (Id. at page 19). Dr. Kohrman felt that Mr. Lewis was unable to perform any repetitive lifting, bending, squatting, pushing or pulling and that he should not lift more than 10 pounds. (Id. at page 19). Dr. Kohrman testified that Mr. Lewis had reached maximum medical improvement and was left with a permanent impairment to the whole body of between twenty four and twenty eight per cent (24 to 28%), in accordance with the AMA Guides (5th edition). (Id., 20-26). Dr. Kohrman testified that Mr. Lewis requires ongoing palliative care and treatment in the form of orthopedic treatment for the knees and left wrist, physical therapy for the cervical, thoracic and lumbar spine, vestibular therapy for post traumatic vertigo, pain management and epidural steroid injections for the thoracic, lumbar and cervical disc herniations. (Id.., 20).

On cross examination, Dr. Kohrman acknowledged that the Claimant has a history of visual field deficit, and that testing is based on patient response. Id. at 34. Motor examination of the arms and legs was normal, therefore, strength and dexterity were normal. There also was an absence of tremor, signifying no injury to the motor cells in the brain. Id. Sensory testing was also normal, signifying that there was no discernable injury to the pathway to the brain and spinal chord. Id., 35. The Rhomberg test, for balance, was normal. Id., 35. cranial nerve testing was normal, inferring that there was no ataxia of the arms and legs.Id., 35 - 36. The gait was noted as antalgic. Id. The reflexes in the ankles were normal, signifying no radiculopathy to the feet. Id. at 37. The reflex in the right bicep was diminished, but Dr. Kohrman did not find any basis for it. Id. at 38. He also did not find atrophy. Id. at 38 - 39. The straight leg raising test was abnormal. Id. at 40. Osteophytes were noted in the neck, but it is assumed that they were present prior to the incident. Id., 40 - 41. Dr. Kohrman acknowledged that osteophyte formation is part of the aging process. Id., 41. Dr. Kohrman noted an increased uptake on MRI in the thoracic spine at T5-T6, T6-T7, but no spinal stenosis was noted. Id. 42 - 44. He noted that there was dessication and agreed that there was evidence of degeneration in the lumbar spine. Id. 44 - 45. He also did not

find spinal stenosis in the lumbar area. Id. at 45. He testified that usung the MRI and x-rays to develop a time line, apparently the new herniation was caused by the March 2001 injury. Id. at 46. When asked to assess "new " studies concerning bulging disks, Dr. Kohrman said that they are not relevant, because although some patients have no symptoms, the Claimant has them. Id. at 49. However, he admitted there is no way to accurately date the dessication noted on MRI. Id. However, Dr. Kohrman maintained that there was evidence of a herniated disk superimposed on the prior impairments. Id at 50. He acknowledges that a pre-existing herniation is possible. Id. at 51. He acknowledged that the knee problems and left wrist were outside his area of expertise. Id. 52. Dr. Kohrman also opined that on a psychiatric basis, work is precluded. Id at 55. He determined that Mr. Lewis would have trouble "paying attention and safely participating in any job". Id.

Dr. Kay

The Claimant was examined by Matthew Kay, M.D. on June 14, 2002. Dr. Kay found that Mr. Lewis has evidence for a right optic neuropathy as evidenced by diffuse optic nerve pallor and marked afferent pupillary defect with corresponding visual field loss. He determined that although there had been significant antecedent visual field loss in the right eye prior ths incident, however, it is also clear that there has been some progression of the field compromise. See report attached to Cx 5. He opined that the Claimant had a five to six percent impairment (5% to 6%) of the whole person caused by the March 26, 2001 incident.

Other Opthamological Records

In 1994 Mr. Lewis was evaluated by Dr. Joel Glaser at the Bascom Palmer Eye Institute; Although Dr. Glaser did not note the presence of an afferent pupillary defect at that juncture, a Humphrey visual field study taken at that time demonstrated a dense double arcuate scotoma in the right eye and an essentially normal Humphrey visual field in the left eye. A follow-up Humphrey visual fields performed at the VA Medical Center in Miami were performed on August 2, 2000, using a different testing strategy. Again, a double arcuate scotoma was present in the right eye being denser interiorly while demonstrating relative supratemporal sparing OD. while the field study in the left eye was normal. A follow-up visual field study of November 27th, 2000 was similar to that noted in August of 2000 with a dense double arcuate scotoma in the right eye sparing centrally and supratemporally while the field study in the left eye was normal. An MRI scan of the brain showed no compressive lesion affecting the optic nerves according to Dr. Post's report. There was an incidental right choroidal fissure cyst. This report was dated February 13 , 2001. Dr. Krista Rosenberg s clinical report of January 24!h, 2002 indicated the presence of optic atrophy (0.0), as well as an epiretinat membrane flfl the latter felt to be related to trauma while the former felt to be related to remote traumatic optic neuropathy. A Humphrey visual field of January 23th, 2002 demonstrated a dense double arcuate scotoma in the right eye, worse when compared to the previous field studies from prior to the second accident, while the field study in the left eye was normal.

Dr. Hamburger

Dr. Hamburger is a board certified ophthalmologist and neuro-ophthalmologist. Cx 5, at 3.[22] He testified by deposition. After reviewing medical records and performing his own visual field and ocular examination of Mr. Lewis on October 25, 2002, Dr. Hamburger found that Mr. Lewis is suffering from a 90% field loss in the right eye. (Id. at 11). He noted the presence of a cataract. He reviewed the actual films and examinations from prior visual field and ocular examinations dated May10, 1994 and August 2, 2000. He reviewed the MRI taken by Dr. Kay in June, 2002.Ex 7. Dr. Hamburger opined that Mr. Lewis had a 50% loss of field vision in the right eye prior to the March 26, 2001 incident. Id at 9 - 11. The impact aggravated the pre-existing vision deficit. He stated that the additional loss of visual field acuity resulted in a 9% permanent partial impairment in accordance with the AMA Guides (5th edition), which was directly caused by the March 26, 2001 accident. (Id. at page 9-12, 18). Dr. Hamburger opined that Mr. Lewis cannot return to work as a longshoreman, and that he can do no climbing, no working at heights, no working around heavy machinery and no work that requires a great deal of binocular vision and/or depth perception. (Id. at 16 - 17, 19-20). He needs to use polycarbonate safety glasses. Id. at 16.

On cross examination, Dr .Hamburger acknowledged that the peripheral field test is subjective and the dependent of the Claimant's responses. Id., 21. He also admitted that he did not know where the Claimant might have struck his head, and noted that the Claimant was wearing a hard hat at that time. Id. 22. When asked to explain how the accident may have aggravated the pre-existing condition, Dr. Hamburger advised that the pre-existing condition made the Claimant more susceptible to injury. Id. at 23. He discounted the fact that a hard hat was involved, advising that it provided "zero" protection. Id at 23. He admitted that all strikes to the head do not cause vision loss, but advised that the right nerve had a prior insult and it was affected and the left was healthy but was not. Id. at 24. He stated that this was definitely not as a result of degeneration. Id. He also testified that there was atrophy prior to the incident and there was more atrophy measured after the accident. He stated that this is an objective finding. Id. 28.

Dr. Herzkowitz

Dr. Herzkowitz is a board certified neurologist, who has been practicing medicine since 1973. Tr at 140 - 141. He was accepted as an expert witness. Id. Dr. Herskowitz testified that the Claimant was examined October 16, 2002. He rendered a report on that date. Ex 12.[23] At that time, the Claimant was wearing a cervical collar, had braces on his right knee, left wrist and back, and was using crutches. Tr., 145. Dr. Herkowitz, noted in removing the collar that there was no spasm in the neck on examination, although the Claimant complained of pain. Id. Although there was an antalgic gait, and he was limping, he reported that this related to the knees. He noted no atrophy, loss of muscles [tone?], loss of sensation or change in reflexes. Id He considered Mr. Lewis' nerve function to be "pretty good." Id.

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[22] Dr. Hamburger's medical records are found at Ex 8.

[23] His report is at Ex 34.

In Dr. Herskowoitz' opinion, "Most of the problems seemed to be related to soft tissue. I asked him to bend over. He could only bend twenty degrees because he said it hurt. I did not feel any muscle spasm. So from a pure neurologic aspect, I didn't find any nerve damage." Id. He testified that in his opinion, as to motor loss, that all of the complaints, "... related to pain and not to actually damaged nerves." Id at 146. As to the absence of atrophy, this implies no log term damage. Id at 146 - 147. Dr. Heskowitz noted that although the Claimant submitted a number of prescribed medications, none were for pain. Id, 148.

Dr. Herskowitz compared pre and post accident MRI scans, and determined that there are degenerative changes in the neck, there is a defect at L4 -L5 that has been present since 1996. Id 148 to 151.

It was Dr. Herskowitz' opinion, to a reasonable degree of probability, that the Claimant did not sustain permanent neurological injuries as a result of the accident. Id, 151. He also would not place any restrictions on the Claimant as a result of the accident. Id, at 152.

On cross examination, Dr. Herzkowitz conceded that a herniated disk can cause a restriction of range of motion in the neck, and can cause limitations to motion and pain in the lumbrosacral spine. Id 152. Dr. Herzkowitz did not have the records of Dr. Pritchard, Dr. Kay, or Dr. Boza when he wrote his report. Id at 155. He also acknowledged that as the accident was described, it may be competent to produce a herniated disk. Id., 156. He also acknowledged that the more one sees a patient the better it is to assess a patient's ability. Id. He agreed that a herniated disk can become symptomatic over time. Id, at 160. He also acknowledged that the MRI showed a loss of the normal S shape at C-4, C-5, and that it is possible that this results from spasm. Id., 162 - 163. He also noted that the MRI shows a herniated disk at C-4, C-5, but that Dr. Herskowitz did not mention this in his report. Id. 163. He explained that the bony spurring noted is from arthritis, and that there is a desiccated disk impinging on the thecal sac, but Dr. Herskowitz advised that it did not impinge on the nerve. Id., 163 - 164. "My interpretation of this is since it's at the same thing in every level, this has been there a long time. There is arthritis. Is there or is there not a super bulge herniation at one of the levels that's new? It's impossible to tell." Id. 165.

Dr. Herskowitz also acknowledged that the 2002 MRI of the thoracic spine showed an increased uptake compared with the 1996 study, but he stated that from a neurological standpoint there was no evidence of nerve damage. Id at 170 - 171. He later testified that he was "not sure" that Mr. Lewis had a herniated disk, because he did not find a compression of the nerve root. He said that there was no clinical correlation, no sign of sensory loss or atrophy, especially in the shoulder. Id at 172 - 173.

Dr.Millheiser

Dr. Millheiser examined the Claimant on August 13, 2002. See report Ex 2, at 109 - 115, Ex 11.[24] He was deposed post hearing. Ex 35. He noted that the Claimant displayed sprains of the neck, back, knees and left wrist on March 26, 2001.Id. at 55. The Claimant was examined and was given certain "pain status inventories", including a pain diagram, CES-D, short form McGill pain questionnaire, Qwestry function test, a pain disability index, a visual analog scale, and a daily diary, along with x-rays and ranges of motion studies. Although the Claimant complained of pain,

[24] Ex 11 contains Dr. Millheiser's report dated August 13, 2002.

Dr. Millheiser determined that the Claimant had no restrictions that he did not already have prior to March 26, 2001. Ex 2, at 115.

> As I look at the records at this time, there does not seem to be any increase of his complaints over his prior complaints. He has not had any surgery for this accident. There is marked over-exaggeration of symptoms. There are multiple symptoms of over-exaggeration. The level of his pain is certainly magnified. Obviously, the exarninee has a significantly arthritic knee, but he was, apparently, able to work until March of 2001 and was, apparently, doing heavy work. The examinee sees himself as basically completely disabled. He is 90 percent disabled for sexual activity; 80 percent disabled for self-care such as taking a shower, driving, and getting dressed; 80 percent disabled for basic life support activities such as eating, sleeping, and breathing; 100 percent disabled for family and home responsibilities; 100 percent disabled for recreation and hobbies and for occupation. I feel that his complaints are completely exaggerated. He does have an osteoarthritic knee diagnosed years ago and in all truth will probably need a total knee replacement, but it is unrelated to this accident.
>
> At the present time, I do not feel the examinee needs any treatment other than occasional visits for anti-inflammatory drugs, if he can tolerate them for the right knee. This is pre-existing. As far as the accident of 2001, I see no reason for any treatment. I see no reason why this examinee cannot do the work that he did prior to the 2001 accident. There is no permanent impairment as a result of this accident.

Id. and Ex 11.

On cross examination, Dr. Millheiser reiterated that the rating was "zero." Id. at 30. Dr. Millheiser did not evaluate eye or psychiatric complaints. Id.

Dr. Millheiser acknowledged that he found a .quarter inch atrophy in the thigh of the left leg. Id at 43 - 44. Although he said it is not likely, he admitted that it is possible for a herniated disk to cause atrophy in the thigh. Id. and 45. It is, he stated, more likely to appear in the calf. Id. He also noted that the disk was on the left and therefore the atrophy was on the opposite side. Id. According to Dr. Millheiser, herniated disks can be asymptomatic and if the Claimant has a herniated disk, it did not cause any restrictive symptoms.

Although he accepts that the Claimant may have sprained his back on the date in question Id. at 57, Dr. Millheiser maintained that the Claimant had over exaggerated all of the symptoms on examination and is a malingerer. Id at 76, 85. Therefore, based on the Claimant's lack of credibility, Dr. Millheiser rendered an opinion that Claimant has no restrictions and can return to former work.

Dr. Castiello

Dr. Castiello is a Board Certified Psychiatrist who saw the Claimant for the Employer/Carrier on October 14, 2002. Ex 33 at 3. See report at Ex 13. Dr. Castiello at first advised that his testimony would be the same as his report. Ex 33 at 8. that he has had a psychiatric history beginning with his military experience to current treatment at the VA Hospital. According to Dr. Castiello, Mr. Lewis "insisted on stating" that everything his current complaints were initiated by the accident of May, 2001 Id. 9. Dr. Castiello dos not agree, as he deemed it

"self serving". Id. He reported that Mr. Lewis kept repeating that the latest accident had more or less been the origin of all of his problems. Id., at 9.

Dr. Castiello also reported that Mr. Lewis alleges that he becomes angry when people accuse him of being accident prone. Id.,10. At first, Mr. Lewis indicated that he saw no reason why people should do that; yet, later, he said that it probably was true. Id. He inferred that this is evidence that Mr. Lewis' life is "centered around that handicap". Id. 10 - 11.

Dr. Castiello's diagnosed Mr. Lewis as having Schizophrenia, paranoid type, which is a major mental illness. The predominant symptoms include disturbance of thinking, accompanied usually by distorted ideation; distorted perceptions; and conclusions that do not correspond to reality. Id.,11. He stated that such an individual can become openly delusional or paranoid, thinking that anything or everybody could be harmful. Id.

After reviewing the deposition of Dr. Boza, as well as Dr. Boza's records, he was satisfied that the other examiners had reached the same conclusions. However, Dr. Castiello did not believe that this diagnosis was related to the incident of March 26, 2001. Id., 12. Dr. Castiello explained that Schizophrenia is an illness that Mr. Lewis had suffered that had been with him all his life, and will be with him for the rest of his life, unless someone finds a cure in the immediate future. Id. It has been there, and it is no different today than it was ten years ago or probably 20 years ago, except that the manifestations change according to the life of the individual. Id at 12-13.

Dr. Castiello did not find any indication of post-traumatic stress disorder in his examination. Id.,13. Mr. Lewis also indicated to Dr. Castiello that he was going to file a claim with the Veterans Administration, because he thought his condition was the result of his military service. Id., 14. According to the testimony, someone with paranoid schizophrenia is not only at a higher risk to manufacture a traumatic accident, but is capable of manufacturing almost anything. Id., 15. Ideas enter the mind and the schizophrenic individual acts on those ideas and the circumstances so that they can try to sell it to others. Id.

Dr. Castiello also reported that Mr. Lewis acknowledged a history of hearing voices prior to this accident. Id. According to the wirness' opinion, these are hallucinatory experiences, and a paranoid schizophrenic can have a hallucinatory experience about a car accident or about anything. Id.,16. Dr. Castiello acknowledged Dr. Boza's prior report of November 21, 2000 when Dr. Boza stated that Mr. Lewis was a chronically psychotic, delusional veteran, whose psychiatric condition has been slowing deteriorating and that Mr. Lewis was disabled due to his psychiatric condition. Id., 17-18.

Prior to the March 26, 2001 accident, his treating physician, Dr. Boza, had diagnosed him with schizophrenia, paranoid type, post-traumatic stress disorder, and dysthymia. Id., 18.

Dr. Castiello testified that he agrees with Dr. Boza that Mr. Lewis would be unable to function in a sustained gainful employment type of situation. However, he determined that the Claimant's mental state was due to the progression of the schizophrenia, and was not related to any particular incident or accident. Id. at 20. When asked whether the Claimant could also have dysthymia, Dr. Castiello stated that dysthymia is a completely different condition unrelated to schizophrenia. Id at 19. In his opinion the schizpophrenia had been in a state of deterioration and will continue to deteriorate. Id. at 19.

On cross examination, Dr. Castiello admitted that he had seen the Claimant on one occasion and that he did not know how the Claimant had functioned prior to or after the date of examination. Id. 21. He also admitted that he had not been made aware of the extent of any orthopedic injuries on the alleged date of accident prior to performing his examination and rendering his report. Id. at 25. When asked whether some patients are able to function with paranoid schizophrenia, he advised that some can but others can not. Id at 27. He admitted that he had been informed by Mr. Lewis that he had been working for three years prior to the accident as a functioning longshoreman. Id. at 27 - 28, 30. When first asked how a schizophrenic might respond to a work accident, at firs Dr. Castiello did not answer responsively, advising that to answer would be "speculation". Id, at 28 - 29. He later admitted that an accident may be competent to cause a worse4ning of the schizophrenia. Id at 29. "That's a possibility. That's as far as I can go." Id. He also admitted that an accident could cause an aggravation of the condition. Id. at 29 - 30. He later was asked to assume that the Claimant was injured on the night of March 26, 2001, and based on that predicate was asked whether the accident would be "an aggravating factor causing his current level of dysfunction." He answered affirmatively. Id. 33 - 34.

In further testimony, Dr. Castiello opined that the Claimant's mental condition led him to exaggerate the extent of his physical impairments. Id. at.38-39. Mr. Lewis' ability to form concepts, accept ideas and evaluate situations has been severely impaired; it has been twisted, changed, and modified. Id. at 39. In Dr. Castiello's opinion, the Claimant was disabled from all work before the accident. Id. at 40. According to the testimony, there is no way to tell when the Claimant may have become disabled, as it is " ...connected to external factors. The main problem is in the mind of the individual. No one can predict when it's going to strike." Id. 41. But he reiterated that the accident had nothing to do with it. Id., 42.

Dr. Levin

The deposition of Bonnie Levin, Ph.D. was taken March 7, 2003. Ex 32. Dr. Levin is an Associate Professor of Neurology and Psychology at the University of Miami and the Director of the Division of neuropsychology. Id. at 5. She explained that neuropsychology involves the study of the brain, behavioral relationships, and specifically how changes to the brain alter behavior. In addition, she testified that the brain affects cognition, which is the way people think and solve problems. Id. Dr. Levin testified that she has been licensed in Florida since 1983 after receiving a Bachelors of Science at Georgetown University, a Ph.D. from Temple University, and training as a Clinical Fellow and psychology from Harvard Medical School, Boston Children's Hospital, and the Miami Veterans Administration Hospital. Id. at 6. She also is with the University of Miami School of Medicine and affiliated with Jackson Memorial Hospital. Id. Over her career, she has over one hundred (100) publications. Id.

Dr. Levin examined Mr. Lewis at the request of the Employer/Carrier on December 12 and 13, 2002. Id., 7. She took a history from the Claimant explaining the subject accident wherein he was complaining of deteriorated vision, neck, wrist, back, and bi-lateral knee pain in addition to foot pain and headaches. Id at10. Dr. Levin also found that Mr. Lewis reported a number of subjective complaints including confusion, slowness of thinking, memory, forgetfulness, problems of judgment, word finding problems, spatial disorientation, visual and

auditory hallucinations. Id. 11. Dr. Levin found the subjective complaints, from a neuropsychological point of view, significant as Mr. Lewis provided a very complicated presentation because he had multiple psychiatric complaints that were clearly well documented historically. Id.at 12. She also noted Mr. Lewis' longstanding history of past medical problems and treatment. Id. at 12-13.

Past psychiatric history included a very prominent and chronic psychiatric history involving schizophrenia and schizophrenic-like symptoms, and paranoia. Specifically, she found that there was a longstanding diagnosis of paranoid schizophrenia with hallucinations. There was also clear evidence of thought disorder pre-dating the accident and associated hospitalization. Id. at 13. The Claimant was honorably discharged from the military service, but it was, in part, due to psychiatric problems, leaving no doubt to Dr. Levin that Mr. Lewis has struggled during his entire life with mental disabilities. Id.

As to Mr. Lewis schizophrenia, Dr. Levin found that he is of the paranoid subtype historically exhibiting suspiciousness and voices with commands, in addition to irritability, mention of past suicide, and being chronically psychotic and delusional. Id.,14. The hospitalization was from 1996 through 1997 for paranoia and schizophrenic symptoms. Id.

Dr. Levin administered a battery of tests aiming to measure a wide range of abilities that look at the general cognitive functioning, overall intelligence and academic achievement, language, judgment, reason and visual spatial skills, attention, and memory. Id. at 16. These standardized intelligence tests were performed at the low average range with exception of perception skills, which were average. Id. at 17. As to intellectual functions, the Claimant was of low average. He was adequate in reading, spelling, and arithmetic, and academic achievement appeared generally average. Id The Claimant exhibited some slowness with regard to memory, but attentional skills were fine. Id.,18. It was also noted that motor testing appeared to be slow, and Dr. Levin suspected it was due to medication. Id., 19.

Dr. Levin performed a Minnesota Multiphasic Personality Inventory (MMPI), the most popular and frequently used personality inventory, indicating that everything with respect to the Claimant was elevated. He had high scores for depression, conversion hysteria, and was confused and disoriented as a result of being very distressed. Id .at 20.

Testifying with respect to the medical records that she had reviewed, Dr. Levin found records from the Veterans Administration Hospital dated November 21, 2000 the most significant. Id., 20-21. In those records, it was indicated that Mr. Lewis was a chronically mentally ill person with a high degree of paranoia and suspiciousness; that he was detached; that he admitted to always feeling tense with a psychological discomfort; hearing voices; and a history of hospitalizations and a constant struggle with mental illness. Id., 21. The psychiatric findings, again, before the subject accident, were paranoia, referential suspiciousness, occasional voices with commands, low mood dysphoria irritability, and a sense of emptiness and thought paranoia. Id. Significantly, Dr. Levin found that there were no cognitive problems at that time. Id. Thus, the Claimant was without cognitive problems, and had mental illness symptoms. Id. From a neuropsychological standpoint, Dr. Levin stated that a lack of cognitive deficit meant that the Claimant could still carryout a basic mental state examination without difficulty. Id, at 21-22.

The records that Dr. Levin reviewed since the subject March 26, 2001 incident were similar as to pre-accident records in terms of thinking and psychiatric problems. Id, 22. As to

neuropsychological findings since the subject incident, Dr. Levin found that Mr. Lewis' concentration was good, that attention was good, and that there was no cognitive deficit. Id., 23. This was significant from a neuropsychological standpoint as Mr. Lewis appeared to be free of cognitive deficits, and also without any memory impairment. Id., 23.

Significantly, Dr. Levin found that there were no changes in cognitive ability from before the subject incident to after the incident, stating that she did not think that he had acquired new cognitive deficits. Id., at 23-24. Specifically, Dr. Levin testified that she did not believe that the accident produced cognitive deficits. Id., 24.

Dr. Levin's overall conclusion was that there was no pattern of cognitive deficits associated with the accident. Id., 25. Mr. Lewis did appear to be in significant emotional distress, but his very prominent psychiatric history was, most likely, the most significant contributing factor to such emotional distress. Id. Thus, within a reasonable degree of neuropsychological probability, the cognitive findings did not appear to be new or as a result of the March 26, 2001 accident in any way. Moreover, there was no issue as to brain damage. Dr. Levin testified that there was nothing new in the terms of neuropsychological performance in that there were no problems with respect to attention, memory, or executive functions. Id., 26. Mr. Lewis also did not fit a profile of trauma, and that from a neuropsychological standpoint, Mr. Lewis did not suffer a permanent injury as a result of the March 26, 2001 incident. Id. at 26-27. Finally, Dr. Levin testified that from a neuropsychological and cognitive standpoint, Mr. Lewis would not have any work limitations or restrictions. Id.

On cross-examination, Dr. Levin testified that she would defer to a psychiatrist on issues of psychiatric disabilities, but would not defer to a psychiatrist on matters of the Claimant's emotional presentation in the course of a neuropsychological evaluation. Id., 34 & 53. She also re-emphasized that, from a cognitive point of view, which is the essence of neuropsychological evaluation; there were no changes and no issues as they may apply to the subject incident. Id., 35 & 5. Dr. Levin re-emphasized that prior cognitive testing performed at the Veterans Administration Hospital showed no evidence of cognitive impairment, and that measurements as to recent and long term memory and overall cognition estimates were all normal. Id., 47. Dr. Levin also answered on cross-examination that any cognitive deficits that the Claimant had, were not attributable in any way to the subject accident. Id., 48. Moreover, any of the complaints, including headaches, confusion, difficulty concentrating, slow thinking, forgetfulness, occasional spatial disorientation, were not attributable to the subject accident as they were entirely consistent with the pre-morbid psychiatric history. Id., at. 48-49.

Dr. Trattler

Henry Trattler,M.D., Board Certified in ophthalmology, examined the Claimant February 21, 2003 on behalf of the Employer/Carrier. Ex 31. He is the Medical Director for the Medical Arts Surgical Center at Baptist Hospital, and is on the staff at Baptist Hospital, South Miami Hospital, and HealthSouth Doctors Hospital, where he is the official physician for the "Miami Heat" professional basketball team. He also has hospital privileges at the Ann Bates Leach Eye Hospital of the Bascom Palmer Eye Institute and Jackson Memorial Hospital. Id., p. 6-7.

Mr. Lewis reported at that time that he was going blind in his right eye. He indicated a prior history of having been hit on the head on the right side, in 1990, by a metal rod; that he had

some injury to his eye then; and that he felt that his vision had gotten rapidly worse in the right eye since as a result of the incident. Dr. Trattler noted that Mr. Lewis had been involved in multiple episodes of accidents, which caused trauma to his hands, back, and other parts of his body. According to the testimony, the 1990 accident caused optic nerve damage and visual field loss to a profound extent, as documented by Dr. Joel Glaser in his 1994 evaluation. Id. at 12. Specifically, he found a twelve (12) year history of right eye constriction of peripheral vision with a small island of retained vision centrally. The left eye was found to be essentially normal. Id, 13. Medical records from Veterans Hospital and Bascom Palmer Eye Institute also confirmed the presence of optic nerve damage in the right eye and visual field loss.

Dr. Trattler found that more recent examinations, with Dr. Harry Hamburger, revealed development of some cataracts of both eyes (which he found to be a normal aging process) and the development of a thickening of the center of the retina in the right eye only, which is known as pre-retinal fibrosis or epiretinal membrane. Id., 13-14. Dr. Trattler stated that pre-retinal fibrosis or epiretinal membranes are commonly seen as people get older. Id at 14. There is no known reason for people developing such a condition, and it causes the vision to be distorted. Dr. Trattler found that the cataracts and the pre-retinal fibrosis were things that one would not find attributable to the type of trauma that was complained of on March 26, 2001. Rather, they are simply changes from aging. Id at 14-15.

Dr. Trattler then performed his own physical examination of both eyes, both with and without dilation. Dr. Trattler found that the Claimant had 20/20 vision in both eyes with glasses. His farsightedness was corrected with glasses, which is typical of someone in his age bracket. Id at 16. Dr. Trattler found that the Claimant clearly had efferent pupillary defect, also known as Marcus-Gunn Pupillary Response, which is one of the truly objective examination findings when one has optic atrophy or optic nerve damage. [P. 16]. With dilation, Dr. Trattler found peripheral cataracts, which were not visibly significant. [P. 16-17]. A fundus examination, using instruments to look at the very back of the eye, revealed optic nerve damage and atrophy in the right optic nerve. Id., 17. The Humphrey Visual Field Test revealed an essentially normal left eye visual field, but a loss of peripheral field in the right eye. Id. 18. Photographs of the optic nerves were taken with a fundus camera, and revealed a pale right optic nerve with evidence of nerve fiber atrophy. Id.. Dr. Trattler also found right eye thickening of the macular area or epiretinal membrane, also known as pre-retinal fibrosis. Id. at 19.

Dr. Trattler also testified with respect to his review of Dr. Hamburger's Heidelberg Retinal Tomography test used to follow optic nerve damage, usually caused by glaucoma. Dr. Trattler found that there would be no way to tell from any such test results as to whether there was any traumatic optic atrophy. Id. 20-21.

Dr. Trattler concluded that, with respect to the left eye, it was completely normal, but for requiring a pair of glasses to read. In the right eye, Dr. Trattler testified that Mr. Lewis had decreased peripheral vision from optic nerve damage which had been documented for at least the last eight (8) or nine (9) years, and that it was likely related to the trauma received when he was hit in the head in 1990. Id. at 22. The head trauma relation was made by the Claimant's prior ophthalmologist. At that time, Mr. Lewis had a central island of vision with significant loss in all directions. Id.. Dr. Trattler commented upon Dr. Hamburger's finding that Mr. Lewis' visual field got better in 2000 compared to 1994; but he testified that was an incorrect interpretation

explained by subjective testing variations, and that there was no evidence that there was any improvement at all. Id. at 24. Rather, the Claimant's optic nerve density simply changed due to the process of aging; the same way the cataract formation increased with aging; and that, importantly, the process was not traumatic in nature. Id. at 25. Accordingly, there was no change of the pre-existing optic nerve damage as a result of the reported trauma of March 26, 2001. Id. 25-26. Dr. Trattler also strongly disagreed with Dr. Hamburger's finding that there was improvement as to optic nerve damage because optic nerve damage does not ever improve, and there could be no medical explanation for any such finding. Id. at 26-27. Dr. Trattler also refuted Dr. Hamburger's finding that the epiretinal membrane was traumatic in nature. Rather, the epiretinal membrane is a normal thing that happens to a lot of people with aging. The chances of epiretinal membrane occurring from aging is quite common. Id. at 28. This condition is very uncommon as a result of trauma, especially when there is no evidence of major direct trauma to the eyeball itself, which clearly did not occur with Mr. Lewis. Id. at 28.

Thus, Dr. Trattler opined that Mr. Lewis not sustain any permanent injury as a result of the March 26, 2001 incident. Id. at 28-29. There were also no restrictions or limitations that would be related to the March 26, 2001 incident, and that rather, any restrictions would be related to the pre-existing condition documented in 1994. Id., 30-32.

On cross-examination, Dr. Trattler re-emphasized that Mr. Lewis absolutely did have optic nerve damage that would be compatible with visual field loss. Importantly, the pattern of loss was very similar to the one that he had for the last eight (8) years. Id, at 45. Dr. Trattler also reaffirmed that optic nerves do not regenerate, and it would not make any sense that Mr. Lewis' optic nerve condition would get any better than it was when optic nerve damage was diagnosed in 1994. Id., 54. The nerves do not grow again, and they can get worse, but they do not get better. Id., 54-55.

Dr. Trattler noted that epiretinal damage to the right eye is present in the record, and although he testified that the accident did not cause it, he admitted that it might have done so. Id., 65. He also stated that if the Claimant did not have stereoscopic vision, he could not return to work as a commercial driver. Id., 67 - 68.

Dr. Trattler re-emphasized during cross-examination that any permanent impairment to the right eye existed prior to the subject incident, and that the impairment had not increased or changed in way regarding the March, 2001 incident. Id. 68-69.

Upon cross-examination from the Regional Solicitor, Dr. Trattler restated his opinion that the visual impairment did not change secondary to the 2001 accident; that the Claimant was already visually impaired; and that he already had significant visual field loss in the right eye. Id., 69. Any variations seen were variations of subjective testing, and that the slight differences seen in optic nerve degeneration were related to age more than anything else. Thus, the visual problems were the result of conditions which predated the subject accident. Id. 70.

Surveillance

Mssrs. Michael Miranda and Raymond Escoto of RJD Investigations testified with respect to their surveillance of the Claimant, and RJD's surveillance videos were moved into evidence. Tr. 357-375. Similarly, Mr. Robert Chamblin of Chamblin and Associates testified with respect to his surveillance. In a video marked September 19, 2001, the Claimant is seen wearing a left knee

brace, a cervical collar, a left wrist brace, and a back brace. He used one crutch to walk. Ex 28. On a video marked September 20, he is seen using a cane, and is visibly limping. Id. In a video marked September 22, more of the same is seen. At times the Claimant walked short distances without any assistive device. Id. In a video marked February 14, 2002, the Claimant is seen driving a green car. Afterward, he is seen walking freely, carrying them. He is seen taking a bag from Esther's Restaurant, but at that time is visibly limping. He was also followed to Walgreen's and to Sears, where he carried a box into the store, and later returned, ostensibly with another box. Ex 27. He apparently had no difficulty lifting the biox to eye level , placing it on the car's roof while he opened the car. Id. He is later seen obtaining a carry out order from Esther's, and is observed to be limping. Id. In a video marked as October 14, 2002 the Claimant is seen wearing a cervical collar and a wrist splint on the left arm; he used crutches to walk to a red car. Ex 26. In a video marked December 10, 2002, the Claimant is seen ambulating without crutches; as at times, he is carrying them, without putting weight on them. At as gas station, he is observed leaning on a crutch. at times it appears that he did not need the crutches to walk. Id.

Mr. Chamblin testified to some of his observations, which were not on the video because he could not get into a filming position. Tr. at 352. He stated that on December 10, 2002, he observed the Claimant on several occasions walking around his vehicle without his crutches, as they were sitting against the back side of his car. According to the testimony, when he finally got into a filming position, Mr. Chamblin filmed Mr. Lewis doing maintenance on his car; walking to the garbage can and back, while mostly carrying the crutches without putting any weight on them. After that, Mr. Lewis drove to the gas station, post office, and then to downtown Miami where Mr. Chamblin lost him near the Union Hall. Tr. 352-353.

Vocational Evidence

Mr.Bilski

Mr. Bilski testified that he is a certified management specialist with twelve (12) years' experience. TR at 96. He has a Master's degree in finance and accounting. Id at 97. He stated that he was licensed in Florida. Id 98. He had given testimony in another Longshore Act case. Id. On voir dire, he admitted he has no advanced degree in vocational education, has not been certified as a consultant with the Social Security Administration to perform vocational services and is not certified by the Department of Labor, has never received any awards, written any published papers, and does not belong to any rehabilitation associations or organizations. Id 98 - 104. He also admitted that his Florida license had been suspended for a one week period due to his failure to pay a required fee. Id 105 - 106. He was shown a letter by counsel alleging that he was suspended from April 11, 2000 to July 2000. CX 12. TR at 107. He also admitted that he could have had the record of suspension expunged, but because he had been actively engaged in litigation at the time, he agreed to attend a required course and pay a fee to be reinstated, rather than protesat, which would have taken another eight weeks. Id 108. He alleged that within seven days of issuance of the letter, he had his licence re-issued. Id at 109.

After reviewing the Claimant's medical providers and his employment history, Mr. Bilski advised that based on a review of all of the medical reports and depositions, he accepted a residual functional capacity of lifting from ten to twenty pounds Id. at 131 - 132. See Labor Market Survey, Ex 22. Also see Vocational Assessment, Ex 29. Based on that physical capacity, He arranged to have the Claimant report for work at Community Services in Miami as a fund

raiser via the telephone at a rate of nine (9) dollars per hour. Tr 132 - 133. However, the Claimant failed to attend.

Mr. Bilski also recommended that the Claimant also perform unarmed security guard training, which he also failed to attend. Id., 133.. Other jobs Mr. Bilski scheduled for Mr. Lewis included tollbooth collector, a sandwich maker, a cashier, and a service writer at a car dealership. Id, 133 - 134.

Mr. Bilski testified that it appeared that Mr. Lewis lacked motivation to work. He added that he would provide Mr. Lewis with personal job development, and that he offered to take Mr. Lewis to the jobs and help him learn them. Id 135 - 136.

Mr. Bilsi testified that he had sent the job descriptions to Dr. Hamburger, the Claimant's opthamologist, and that Dr. Hanberger had approved many of them. Id 137 - 138.

In sum, Mr. Bilski testified that in his opinion, the Claimant was employable, with restrictions to light/sedentary duty. Id., 139.

On cross examination, Mr. Bilski was asked whether the Claimant had any non-exertional limitations imposed by physicians.

"When you say non-exertional, I don't know what you're referring to?"
Id. 186. When asked why he considered Mr. Lewis' residual functional capacity to be "light" to "sedentary", Mr. Bilski advised he took it from Dr. Gordon's deposition. Id at 190. He later acknowledged that Dr. Gordon actually opined that the Claimant could not perform work in any capacity. Id. 192. He also admitted that Dr. Priitchard and Dr. Korman had testified similarly. Id., 193. He also admitted that Dr.Korman had advised that the Claimant was restricted to lifting, bending, squatting, pushing and pulling. Id. He also advised that Mr. Lewis should not lift more than ten (10) pounds. He noted that Dr. Hamburger has determined that Mr. Lewis should not operate heavy equipment or drive commercial vehicles due to right eye blindness and a loss of peripheral vision. Id, 197.

It was Mr. Bilski's opinion that a person who can not perform lifting, bending, squatting, pushing and pulling can perform the full range of sedentary work. Id., 194.

Mr. Bilski also testified that he was not familiar with the term, "SVP". Id. at 198.

He admitted that he had found every claimant he had evaluated involving Mr. Mermell to be employable. Id., 199. And in every one of those cases, he had referred claimants to Community Services. Id.

Mr. Bilski stated that because the Claimant had experience in the music industry, he had acquired skills that he could use in telephone marketing. He admitted that this work occurred more than twenty years ago. Id at 202 - 205. He also recognized that the Social Security Administration uses fifteen years as a relevant period to evaluate past relevant work. Id at 207.

Mr. Bilski also admitted that to be a security guard in Florida, one would have to become certified. Id., 208.

Mr. Bilski advised that all of the jobs he cited were low stress jobs. Id., at 209.

Mr. Magee

Harry Magee was engaged by the Claimant, and interviewed Mr. Lewis, and rendered a report documenting his findings and conclusions as follows.

> Based upon my analysis of the claimant s education, employment experience, lack of transferable job skills, and physical/mental/sensory restrictions as outlined in the medical evidence reviewed above, it is evident that there exist in the local, state, and national economy no full-time, substantial gainful activity jobs which could be performed by the claimant within his current restrictions. It should be noted that this claimant worked full-time as a longshoreman from January 1998 to the 03/26/01 subject date of injury in the job of longshoreman/loader-unloader, DOT # 929.687-030, heavy-duty, semiskilled, with SVP 3. The fact that the claimant performed this full-time job from January 1998 up to the 03/26/01 subject date of injury indicates that claimant certainly was capable of performing heavy-duty work activities in terms of exertional level.

Cx 7.

According to Mr. Magee. medical evidence indicates that the claimant is now unable to perform work of any kind. Based on that assumption, the claimant has no present or foreseeable vocational potential for return to full-time employment. See supplemental report dated March 3, 2003, attached to Cx 7..

Presumption of Compensability under Section 20(a)

The Employer/Carrier argues that the Claimant has failed to establish a prima facie case of compensability under the Act.[25] It argues " because the incident in this claim was unwitnessed; because his credibility has been destroyed; and because his pre-existing injuries are legion, the Claimant may not even carry his initial burden under the Act. Even if he does, the Employer/Carrier has provided specific and comprehensive evidence to rebut the presumption and ultimately must prevail on the merits." See Brief.

Section 20 of the LHWCA provides in part pertinent:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary--
>
> (a)That the claim comes within the provisions of this Act.

33 U.S.C. § 920.

Prima Facia Case

The claimant must establish a prima facie case by proving that he suffered some harm or pain, ***Murphy v. SCA/Shayne Brothers***, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that an accident occurred or working conditions existed which could have caused the harm. ***Kelaita v. Triple A Mach. Shop***, 13 BRBS 326 (1981). See ***U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley***), 455 U.S. 608, 14 BRBS 631, 633 (1982), *rev'g* ***Riley v. U.S. Industries/Federal Sheet Metal***, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); ***Gooden v. Director, OWCP***, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); ***Bolden v. G.A..T.X. Terminals Corp***., 30 BRBS 71 (1996); ***Stevens v. Tacoma Boatbuilding Co.***, 23 BRBS 191 (1993). It is the claimant's burden to establish each element of his prima facie case by affirmative proof. See ***Kooley v. Marine Industries Northwest***, 22 BRBS 142 (1989); see also ***Director, OWCP v. Greenwich Collieries***, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). In presenting his case, the claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, the claimant must show that working conditions existed which

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[25] Citing to ***Kelaita v. Triple-A Machine Shop***, 13 BRBS 326 (1981).

could have caused his harm. See generally ***U.S. Industries/Federal Sheet Metal, Inc***., 455 U.S. at 608, 14 BRBS at 631.In ***U.S. Industries***, the United States Supreme Court stated, "[a] prima facie 'claim for compensation,' to which this statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." 455 U.S. at 615, 14 BRBS at 633. This holding is consistent with those in ***Kelaita***, 13 BRBS 326, and ***Darnell v. Bell Helicopter International***, 16 BRBS 98 (1984), *aff'd sub nom*. ***Bell Helicopter International v. Jacobs***, 746 F.2d 1342, 17 BRBS 13 (CRT) (8th Cir. 1984). See ***Noble Drilling Co. v. Drake***, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986).

Mr. Lewis alleges that he was engaged in work operating the Employer's mule, performing Employer's business, when the mule "stopped short", causing him injuries on the head, neck, left wrist, back and knees; and that he has had pain, limitation of body motion, vision deficits, balance and mental problems as a result. He alleges that these injuries arose out of the course and scope of the accident, on March 26, 2001. He describes the mule as similar to a tractor trailer, but said that it is not really a tractor trailer. Tr. at 262. It did not have a seat belt. Id at 263.

He advises that he told his immediate supervisor that there had been an accident, during the shift when it happened. Tr., at 265, 331 - 332. He filed a Notice of Injury Report. and alleges that the local police investigated and filed a report on that date. Port security was also notified. See Cx 4 at 55 - 56. However their reports were not offered into evidence.

Employer does not deny that the Claimant was engaged at work for it on that date. The record shows that the Claimant was at work and was assigned to drive the mule. Employer/Carrier offers no affirmative proof to reach a conclusion that no accident occurred, but asks me to find, based on circumstantial evidence, that no accident occurred. In part this rests on the opinion of Dr. Anastasio Castiello, M.D., a psychiatrist, who offered an opinion that the entire sequence of events may have been a figment of the Claimant's condition, an hallucination or an imagined event. It also relies on impeachment of the claimant for truth and veracity to do so.

I accept that the Claimant has established that working conditions at the port were such that they could have caused the alleged injury. working conditions existed which *could* have caused his harm. ***U.S. Industries/Federal Sheet Metal, Inc***., *supra*. The Claimant testified that he notified the Port and that an accident report was filed by the local police. The Employer did not provide rebuttal evidence on whether the conditions could have caused injury.

Moreover, a review of the evidence shows that the Claimant has provided substantiation that he had been injured in the reports and testimony of Dr. Pritchard, who is a long time treating physician, who observed the Claimant bearing signs of injury when examined a couple of days after the accident. Substantiation evidence is also offered by the records and testimony of Dr. Boza, who advises that the Claimant had pre-existing paranoid schizophrenia, and advises that the nature of this impairment colors the Claimant's view of the world and that he has a medical reason why he sometimes does not present history in a cogent manner, but that the preexisting condition was aggravated by the accident and moreover the Claimant also has post traumatic stress and dysthymia.

Substantiation is also offered by the records and testimony of Dr. Gordon, who examined the Claimant, noted that he had been injured and treated him for those injuries. Although the Employer/Carrier argues that Dr. Gordon is more of an advocate than an expert witness, the record shows that the Claimant had an altercation with Dr. Gordon and considers him to be

unsympathetic. In testimony, even Dr. Millheiser ratified the contention that as of the date of injury, the claimant has strains and sprains that required medical attention and medical treatment. Ex 2, at 57. It is reasonable that these came from the accident. No other possibility has been offered.

Substantiation is also offered by the Claimant's un-rebutted assertion that he had told his supervisor he had been injured on the job. Further proof includes the Notice of Injury report.

Substantiation is also offered by the opinion of Dr. Kay and Dr. Hamburger that the Claimant aggravated a pre-existing eye injury. Dr. Henry Trattler, the Employer/Carrier expert, was not asked whether the fact that Mr. Lewis had a pre-existing condition made him more susceptible to further injury from trauma. As discussed supra, I accept that the Claimant received a blow to the head on March 26, 2001, aggravating a vision deficit.

Impeachment comes for the most part through the testimony of Employer/Carrier expert witnesses, who state that the Claimant is not credible as to his body complaints, and is a malingerer, and is capable of imagining the entire affair or lying about it.

However, a review of the expert testimony shows that none of the expert witness expressly deny that an accident occurred. Dr. Castiello initially took that position, but in his deposition he admitted that he had not seen the treatment records from Dr. Gordon when he had formed his conclusion and the testimony shows confusion about whether the Claimant had been functioning well enough to have been working on the night of March 26, 2001, when the accident occurred. It was his opinion that the accident never happened at all. Ex 33. In fact, Dr. Castiello's testimony is conflicted, because he determined that the Claimant was totally disabled from paranoid schizophrenia prior to the date of accident. Id at 42. A logical inference would be that Dr. Castiello also denies that the Claimant worked that day! The full weight of the evidence shows that the Claimant had worked for approximately three years prior to that night as a longshoreman and that he was functioning as a longshoreman on the day in question. The record also shows that the Claimant was not functioning after the date in question. During the deposition, this information was acknowledged to have been new to Dr. Castiello. Id., 27 - 28, 30. He also admitted that he had not been made aware of the extent of any orthopedic injuries on the alleged date of accident prior to performing his examination and rendering his report. Id. at 25.

Moreover, based on a hypothetical predicate presented to him by the Claimant that the Claimant might have been functioning and had sustained an injury, he accepted that an aggravation of the paranoid schizophrenia occurred and he accepts that the Claimant is precluded from engaging in work related activities as a result of the illness. Thus, his testimony impeached his report and the initial opinion that the accident never occurred.

There is no doubt in the record that the Claimant had a pre-existing mental impairment prior to March 26, 2001. Although the Claimant was in treatment at the VA for psychosis, there are no records from the Port to show that this condition in any way affected his work in the period leading to March 26, 2001. Although the Claimant's treating physician at the Veteran's Administration, Dr. Boza, had treated the Claimant with anti-psychotic drugs prior to the accident, on the evening in question, there is no evidence that he had psychotic or depressive symptoms or was in any emotional state of distress at that time. There is no evidence to show that in any way that the Claimant was delusional and merely imagined that the accident had occurred on the evening of March 26, 2001. Dr. Boza did evaluate the Claimant on several occasions prior to

March 26, 2001 and did state that he was "totally disabled" prior to the accident. The facts show that despite this opinion, the Claimant had maintained an ability to work prior to March 26, 2001. But it is Dr. Boza's testimony that the accident aggravated and worsened that condition. Cx 3 at 6, 11, 16, 22, 25. Prior to March 26, the Claimant was treated for paranoid schizophrenia and dysthymia. Prior to the incident, the Claimant had exercised "moderate" control. Id. at 38. After the accident, the Claimant was placed in weekly anger management sessions with a therapist. In July, 2001, Dr. Boza added the diagnosis of post traumatic stress disorder. Dr. Storper, also a psychiatrist, who is neither a Claimant or Employer/Carrier witness, determined that when he examined the Claimant post accident, the Claimant revealed impaired judgement and "conflict" with other people, and advised that this "places him at risk". Cx 10. Dr. Castiello, the Employer/Carrier's expert, doubted very much that Mr. Lewis would be able to function in a sustained gainful employment type of situation; but stated that this was not related to any particular incident or accident. Ex 33. at 20.

Although the Employer/Carrier reminds that Dr. Boza did not have all of the records relating to the Claimant's physical treatment pre and post accident, of all other physicians in this record, Dr. Boza had the perspective of observing the Claimant's behavior and diagnosing the Claimant's mental status both before and afterward. He explained that Mr. Lewis is "compartmentalized" in his thinking, and did not fully explain how the accident had affected him until several months had passed. In addition, the record shows that the Claimant told his supervisor, his union, and both Dr. Pritchard and Dr. Gordon when the opportunity to do so was presented.

Dr. Castiello believed that the Claimant's mental condition led him to exaggerate the extent of his physical impairments. Id. at.38-39. In his opinion, Mr. Lewis' ability to form concepts, accept ideas and evaluate situations has been severely impaired; it has been twisted, changed, and modified. Id. at 39.

Based on this record, greater weight must be attributed to Dr. Boza with respect to Claimant's allegations of the narrative facts and that he had an injury on March 26, 2001 than to Dr. Castiello. I note that both are board certified in psychiatry, and I do not accept that one is more qualified than the other. However, there are six (6) separate reasons why Dr. Boza's opinions regardsing causation must be credited over that of Dr. Castiello.

First, as I stated above, Dr. Castiello's initial report and opinion that the Claimant hallucinated or imagined the accident is based on a poorly documented record. The Benefits Review Board ("BRB") has taken a position that an unreasoned or undocumented opinion may be given little or no weight.[26] Dr. Castiello testified that he did not have crucial treatment records

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[26] ***Clark v. Karst-Robbins Coal C***o., 12 B.L.R. 1-149 (1989)(en banc). See also ***Mabe v. Bishop Coal Co.***, 9 B.L.R. 1-67 (1986) (a report which is internally inconsistent and inadequately reasoned may be entitled to little probative value). Although there are cases under the Black Lung Benefis Act, their application is the same. Moreover, in ***Drummond Coal Co. v. Freeman***, 17 F.3d 361 (11th Cir. 1994), the Eleventh Circuit held that an administrative law judge "need not . . . find that a medical opinion is either wholly reliable or wholly unreliable"; rather, the opinion may be divided into the relevant issues of entitlement to determine whether it is reasoned and documented with regard to any particular issue.

when he rendered the report. The facts show that although the Claimant may have been impaired, he was able to work prior to March 26, 2001. Whether he was in remission or was able to cope due to active treatment, there is no evidence to show that Mr. Lewis could not work prior to March 26, 2001 or that the Employer in any way made a special accommodation for him or provided sheltered work. The facts show that the Claimant notified the employer, his union and notified Dr. Pritchard as soon as it was practical. On that date, I accept that an accident occurred and at a minimum, the Claimant sustained soft tissue damage, which is confirmed by several separate sources. Although Dr. Castiello dismisses the notion that the accident was a traumatic event, none of the treating sources agree, and Dr. Castiello is alone in this position.

Second, I do not accept that Dr. Castillello had as clear a perspective in his examination of the Claimant to render a valid opinion as did Dr. Boza. Dr. Boza is the treating psychiatrist. Dr. Castiello saw the Claimant only on the one occasion, whereas Dr. Boza has seen him on numerous occasions, both before and after the accident. Although he presented some conflicting testimony regarding the extent of the Claimant's impairment, his observations concerning the Claimant are far more detailed and cover a longitudinal process and his conclusions are based on a more thorough explanation of the Claimant's psychiatric history. When an injured employee seeks benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), a treating physician's opinion is entitled to "special" weight. ***Amos v. Director, Office of Workers' Compensation Programs***, 153 F.3d 1051 (9th Cir., 1998) ; *See also*, ***American Stevedoring Ltd. v. Marinelli***, 248 F.3d 54, (2nd Cir., 2001)***; Lozada v. Director, Office of Workers' Compensation Programs***, U.S. Dept. of 1991 A.M.C. 303 C.A.2,1990; Longshore and Harbor Workers' Compensation Act, §§ 1 et seq.[27]

Third, Dr. Castiello made several internally inconsistent statements that are misleading. As a result, I do not accept Dr. Castillo's position that the Claimant's schizophrenia is the cause of all of the Claimant's mental difficulties post accident. Dr. Castiello admitted that the Claimant can not function in work settings. Id., 19. When presented with the fact that the Claimant had worked prior to March 26, 2001, Dr. Castiello characterized Mr. Lewis as an automaton. He could not refute that there had been a change in the Claimant's mental state that occurred subsequent to March 26, 2001. But he attributed it to deterioration due to age and "other factors". Id. He was given an opportunity to provide what other factors might be, but did not elaborate further. He said affirmatively that schizophrenia by its nature caused the inability to perform work related tasks. Id at 12 - 13. But he did not adequately explain how the Claimant was able to perform work related activities prior to March 26, 2001. His assertion that the Claimant despite totally disabling schizophrenia, could maintain work by going through the motions is not carried out by the remainder of the record. He failed to acknowledge that paranoid schizophrenics, who are overly suspicious and hostile by nature, have a medical reason to appear not to be credible. Id. at 43. But he said that the Claimant is not credible because of symptoms related to schizophrenia. He also testified in essence that schizophrenia has its own "evolution" that happens at random. "When and how, not necessarily, and I mentioned that already, is connected to external factors. The main problem is in the mind of the individual. No one can predict when it's going to strike." Id. 41 He

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[27] In ***Pietrunti v. Director, Office of Workers' Compensation Programs***, 119 F.3d 1035 (2nd Cir., 1997) an ALJ's findings were reversed by the court because he failed to attribute "great" weight to the opinion of a treating physician.

also admitted, however, that an event like the accident can trigger an aggravation of the illness. The record shows that the Claimant was functioning prior to the accident, and afterward was not functioning on a psychiatric basis. The record also shows that before the accident, the Claimant was not in treatment for his neck, back, knees and for vision problems; afterward he received treatment. Moreover, Dr. Castiello was not provided the details of the Claimant's history of eye trauma, and the record shows that prior to accident the Claimant could operate bilaterally visually and after the accident, he became essentially a one eyed person.[28] He did not hallucinate physical injuries that required medical treatment.

Dr. Boza's explanations are more consistent and more logical than Dr. Castiello's on the nature of the Claimant's schizophrenia. Two days after the accident, the Claimant reported auditory and visual hallucinations. Ex 2 at 76, Ex 10 at 124. Even if the Claimant did not have an increase in the severity of the symptoms of hostility and an inability to get along with others, the episodic frequency is increased. Records from the VA show that he had weekly treatment and weekly displays of hostility and suspiciousness. Ex 10, 18.21, 29 -31, 33- 43, 50 - 53, 54, 56 - 58, 61 - 62, 67 - 68, 77 -9, 86 - 87.

Fourth, there is evidence from Dr. Castiello's testimony to accept that despite his assertion in the report that the accident couldn't have caused the impairment, if the injury is found to be compensable, Dr. Castiello accepts that the Claimant has had an aggravation of the paranoid schizophrenia. He was presented a hypothetical requesting him to assume that the Claimant was hurt on the job,. In response, he acknowledged that if the predicate were true, an aggravation did occur. Ex 33 at 33 -34. Later, in rehabilitation of that testimony, he admitted that the Claimant was not employable, but he reasserted that it was not as a result of the accident. Id. 41, 43. I find that the logic is flawed, and if one considers that the Claimant had been treated for the accident by an authorized source, and that there is other substantiation for the fact that the Claimant had physical injuries, the rehabilitation testimony is disingenuous. I am the finder of fact and if I determine that the substantial evidence shows that the predicate has been met, aggravation of the schizophrenia is proved. Therefore, although his report stands for the proposition that the Claimant's schizophrenia was entirely pre-existing, as I find that the Claimant suffered a physical injury, Dr. Castiello's his testimony may be used to substantiate Dr. Boza's findings as to aggravation.

Fifth, a close reading of the whole of the transcript shows that Dr. Castiello falsely assumed that there had to be physical trauma for a mental impairment to qualify as an "injury" under the Act. Even if there may have been no trauma, aggravation of a mental impairment can be a qualifying injury under the LHWCA if work-related. ***Dygert v. Manufacturer's Packaging Co.***, 10 BRBS 1036, 1043-44 (1979).[29] In cases involving allegations of the existence of stressful

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[28] See discussion in Medical Profile, supra.

[29] A claimant who sustained a work-related back injury, requiring two surgical procedures, however without significant objective findings, and who then was unable to work because of the unrelenting complaints of pain was awarded total disability benefits for the resultant conversion hysteria and his inability to return to work as the judge concluded the claimant's disability was work-related although wholly psychological in nature. Also see ***Director, OWCP v. Potomac Elec. Power Co. (Brannon)***, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (work injury

working conditions, irrespective of any legitimate personnel actions, the Board has held that a claimant's minimal burden in establishing a prima facie case requires simply that he demonstrate the existence of working conditions which could have caused or aggravated his psychological injury. See ***Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base***, 32 BRBS 127, at 129 (1998)(en banc)(McGrannery, J.dissenting), *aff'd on recon. en banc at* 32 BRBS 134 (1997)(Brown and McGranery, J.J., dissenting) at 136; ***Konno v. Young Brothers, Ltd.***, 28 BRBS 57, 61 (1994); ***Marino v.Navy Exchange***, 20 BRBS 166, at 168, (BRB No. 88-1720(Dec. 12, 1990)(Unpublished). at 61. A demonstration by a claimant of stress in his daily work environment, including day-to-day interactions with his supervisor, may satisfy the "working conditions" prong of the claimant's prima facie case. See ***Sewell***, 32 BRBS at 136. A claimant is not required to show unusually stressful conditions in order to establish his prima facie case. See, e.g., ***Wheately v. Adler***, 407 F.2d 307 (D.C. Cir. 1968). Rather, even where the stress may seem relatively mild, the claimant may recover if an injury results. See ***Sewell***, 32 BRBS at 137; ***Konno***, 28 BRBS at 61.

And sixth, I find Dr. Boza's diagnosis to be more rational than Dr. Castiello's.[30] He had a more complete record to review. He did not give guarded and obsequious responses to simple questions. Dr. Boza and Dr. Casiello completely part company on the issue whether the Claimant suffered a post traumatic stress disorder as a result of the accident. Id., 13. The record shows that in an office note dated June 3, 2001, Dr. Boza recorded that the Claimant had hurt his back and knees. Cx 3 at 13. The diagnosis of post traumatic stress was added in July, 2001 upon a showing of increased withdrawal. "He was very withdrawn, very withdrawn. His repetition of the incident over and over and over again. " The VA record shows an increase in the frequency of treatment after March 26, 2001.Ex 10. I accept that this is another positive factor. Dr. Levin, upon psychological testing, found Mr. Lewis had high scores for depression, conversion hysteria, and was confused and disoriented as a result of being very distressed. Ex 32.at 20. This, in part, substantiates Dr. Boza's opinion as post traumatic distress and conversion hysteria are related.

A review of the evidence submitted shows that none of the other medical experts deny that the authorized medical treatment provided by Dr. Gordon was necessary and reasonable. Dr. Gordon, Dr. Boza and Dr. Pritchard all saw the Claimant at a time shortly after the accident was to have occurred and are in the best position to evaluate whether the Claimant was injured. Dr. Gordon made a reasonable inference that the ailments that he treated were from a work related source, and I credit this testimony. I also accept that the presentations of Dr. Pritchard and Dr. Boza, both of whom had treated the Claimant before and after the accident, and saw him a couple

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results in psychological problems, leading to suicide); ***Butler v. District Parking Management Co.***, 363 F.2d 682 (D.C. Cir. 1966) (employment caused mental breakdown); ***American Nat'l Red Cross v. Hagen***, 327 F.2d 559 (7th Cir. 1964) (work environment precipitates acute schizophrenia reaction); ***Urban Land Inst. v. Garrell***, 346 F. Supp. 699 (D.D.C. 1972) (nervous reaction precipitated by stressful pressures of job; no one physical or external cause of psychological injury necessary).

[30] The BRB has determined that it is proper to accord greater weight to an opinion which is better supported by the objective medical data of record. ***Minnich v. Pagnotti Enterprises, Inc***., 9 B.L.R. 1-89, 1-90 n. 1 (1986); ***Wetzel v. Director, OWCP***, 8 B.L.R. 1-139 (1985).

of days after the accident occurred, substantiate, in part, the Claimant's assertions that he physical signs of injury. In addition, Dr. Castiello did not explain why the Claimant was treated for post traumatic headache by Dr. Gordon and explain any relation they may have to post traumatic stress disorder. Also see *infra* with respect to whether an injury occurred.

I also do not accept that the testimony of Dr. Herskowitz and Dr. Millheiser provide support to the argument that no accident occurred. Although they question Mr. Lewis' credibility as to his physical complaints, a close reading of the testimony shows that both accept that an accident occurred. I do not accept that any lack of credibility as to complaints necessarily precludes acceptance that an accident occurred or that Mr. Lewis was injured.

I also note that the Employer/Carrier made no controvert to whether an accident occurred, or for that matter, to anything in this case. It authorized treatment for the accident with Dr. Gordon. If it investigated the matter, it did not offer any evidence that it had done so. It presented absolutely no contradictory testimony regarding the existence of potential hazards in operating the mule at the Port of Miami and did not challenge the Claimant's description of how the mule stopped short, injuring him. [31]

With respect to whether the Claimant has established a prima facia case, the fact that there were no eye witnesses to the accident is not very persuasive as a basis to discount the other evidence. Although it may give the Claimant an opportunity to lie or to mislead whether the accident occurred, there is no showing that the Claimant is lying. I note that with respect to the Claimant's testimony, no documented impeachment as to the specific details were offered by the Employer/Carrier as to the facts that may have occurred the evening of March 26, 2001. It is solely within my discretion to accept or reject all or any part of any testimony, according to my judgment. ***Perini Corp. v. Hyde***, 306 F. Supp. 1321, 1327 (D.R.I. 1969). Therefore I have discretion to accept all of the Claimant's assertions, or accept those that I consider to be substantiated by other evidence.[32]

I had an opportunity to observe the Claimant over two days of testimony. The record shows that he has a mental impairment that makes him hostile, suspicious and guarded. Although his former attorney had obtained a large settlement in a prior case involving the same Employer, and was able to obtain authorization for treatment in this claim, Mr. Lewis fired him. Although Dr. Gordon had been treating him, he quarreled with him and sent Dr. Gordon letters that can be read as disrespectful. The Claimant had paranoid ideation about Dr. Gordon. The record shows that

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[31] Compare ***Sanders v. Alabama Dry Dock & Shipbuilding Co.***, 22 BRBS 340 (1989) (benefits were denied where claimant's testimony regarding his working conditions was nonspecific, uncorroborated, and contradicted by his fellow workers, and the medical testimony indicated that claimant's problems [i.e., severe headaches, lethargy, slurred speech and staggering] would have existed regardless of whether he was employed by the employer).

[32] The Board will not interfere with credibility determinations made by an ALJ unless they are "inherently incredible and patently unreasonable." ***Cordero v. Triple A Machine Shop***, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 **U.S.** 911 (1979); ***Phillips v. California Stevedore & Ballast Co.***, 9 BRBS 13 (1978).

although he asked for treatment from Dr. Pritchard in this claim, he had made similar accusations and placed pressure on him, also.

With respect to the surveillance evidence, although I do not accept all of the Claimant's allegations regarding the extent of his injuries, and his physical capacity, I accept that if there is some secondary gain, even Dr. Castiello advised that it is to be expected from a person with paranoid schizophrenia. I do not accept that the Claimant has manipulated the psychiatric record, and lied about everything. He has a history of mental illness that probably predates his military service.

Despite his apparent mental impairment, the Claimant was responsive to most of the questions and was able to manage his emotions even when closely questioned. He wasn't able to remember all of the medical treatment he has received, but acknowledged that he has certain personality deficits. Given that the questioning covered a period from 1966 to the present, his memory was reasonably accurate, and I find that he did not try to evade any issue or avoid any question. I note that some of the complaints may be exaggerated, but I also note that the Claimant is a patient at several separate VA clinics for medical conditions unrelated to his current claim, but I note that these require treatment. Even Dr. Castiello testified that the Claimant's conduct is consistent with the diagnosis of paranoid schizophrenia. Although he has a history of auditory and visual hallucinations, a review of the record shows that none of these are similar to anything that Dr. Castiello imagined. These relate to religion and the ethereal, rather than to such worldly matters such as a work related accident.

Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. See ***Dumas v. Schweiker***, 712 F.2d 1545, 1552 (2d Cir. 1983); ***Sylvester v. Bethlehem Steel Corp***., 14 BRBS 234, 236 (1981), *aff'd sub nom*. ***Sylvester v. Director, OWCP***, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982). I am entitled to determine the credibility of the witnesses, to weigh the evidence, and draw inferences from it, and I am not bound to accept the opinion or theory of any particular witness. ***Banks v. Chicago Grain Trimmers Ass'n***, 390 U.S. 459 (1968); ***Todd Shipyards Corp. v. Donovan***, 300 F.2d 741 (5th Cir. 1962); Scott v. Tug Mate, Inc., 22 BRBS 164, 165, 167 (1989); ***Hite v. Dresser Guiberson Pumping,*** 22 BRBS 87, 91 (1989); ***Anderson v. Todd Shipyards Corp***., 22 BRBS 20, 22 (1989); ***Hughes v. Bethlehem Steel Corp***., 17 BRBS 153 (1985); ***Seaman v. Jacksonville Shipyards***, 14 BRBS 148.9 (1981); ***Brandt v. Avondale Shipyards***, 8 BRBS 698 (1978); ***Sargent v. Matson Terminals***, 8 BRBS 564 (1978).

Although Mr. Lewis made some inconsistent statements and is given to hyperbole, I do not accept that he is a "liar", as depicted by the Employer, and that I should discredit his entire testimony. I accept that he has paranoid schizophrenia and is guarded. I recognize that he has an inordinate fear of becoming "disabled". Tr, 247.[33] I recognize that he does not have an accurate depiction of the nature of his illness and has placed undue emphasis on the physical impairments rather than his mental condition. I accept that he is limited in interpersonal relationships. Tr., at 226. 242. I accept that he provided inappropriate responses in some of the examinations and has

[33] "Every time I have an accident it interferes with my mental state, because I have an idea of becoming disabled." Id., 247.

tried to advantage the system. However, given a review of the complete record, I credit his testimony as to the details of the accident with significant weight.

After a review of all of the evidence, based on what I consider to be competent substantiating evidence, I accept the Claimant has established a *prima facia* case.

Injury

The Board has ruled that the presumption does not apply to the issue of whether a physical or psychological harm or injury occurred. See ***Devine v. Atlantic Container Lines***, G.I.E., 25 BRBS 15 (1990); ***Murphy v. SCA/Shayne Bros***., 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979).Section 2(2) of the LHWCA defines "injury" as:

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. § 902(2).

This definition comprises the second of the two (2) traditional requirements of workers' compensation law: the injury or death must (1) arise out of employment and (2) in the course of employment. The definition also includes an occupational disease or infection which arises naturally out of employment or unavoidably results from the accidental injury. See Bober, “Compensable Injury or Death Arising Under the Longshore and Harbor Workers' Compensation Act”, 35 ***Loyola L. Rev***. 1129 (1990).

A claimant has sustained an "injury" where he has some harm or pain, or if "something unexpectedly goes wrong within the human frame." ***Wheatley v. Adler***, 407 F.2d 307, 313 (D.C. Cir. 1968) (en banc). The claimant's burden does not, despite the assertion in the Employer/Carrier brief, however, include establishing an injury as defined in Section 2(2) of the LHWCA. In ***Kelaita***, the Board noted that to place such a burden on the claimant would be contrary to the well-established rule that the Section 20 presumption applies to the issue of whether an injury arose out of and in the course of employment. ***Kelaita***, 13 BRBS at 329.

If an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. ***Independent Stevedore Co. v. O'Leary***, 357 F.2d 812 (9th Cir. 1966); ***Rajotte v. General Dynamics Corp***., 18 BRBS 85 (1986). Also, when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural, unavoidable result of the initial work injury. ***Bludworth Shipyard v. Lira***, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); ***Hicks v. Pacific Marine & Supply Co.***, 14 BRBS 549 (1981).

I agree with the Employer/Carrier that I can properly discredit the credibility of a claimant's testimony and conclude that the evidence fails to establish the occurrence of an injury. ***Mackey v. Marine Terminals Corp***., 21 BRBS 129 (1988). However, I choose not to do so in this case.

As I stated above, I accept that an accident happened. Apparently, the Claimant was injured when the mule, “stopped short”and the Claimant was thrown about the cab. The Claimant offers the testimony and reports of Dr. Pritchard, Boza, and Gordon, all of whom are treating physicians and who saw the Claimant over a period of treatment to establish that injuries occurred.

Again, it is solely my discretion to accept or reject all or any part of any testimony, according to his judgment. ***Perini Corp. v. Hyde***, *supra*. Therefore I have discretion to accept all of the Claimant's assertions, or accept those that I consider to be substantiated by other evidence.[34]

I accept that the treating physicians were in the best position in terms of the time line, in terms of the numerous times they had an opportunity to evaluate the Claimant, and in terms of the logic of their positions on the issue whether an injury occurred.

As I had stated above, a review of the evidence submitted shows that none of the experts affirmatively deny that the authorized medical treatment provided by Dr. Gordon was necessary and reasonable. Even Dr. Millheiser, who testified that the Claimant has all of the attributes of a malingerer, advised that he believed that the Claimant suffered sprains as a result of the accident. Ex 35 at 57. Dr. Gordon's treatment went to what has been characterized as a myofacial syndrome. See testimony of Dr. Krimshtein, Cx 6, at 26 - 28. Besides the treatment that Dr. Gordon personally provided, Mr. Lewis was provided fifty six (56) physiotherapy sessions. Cx 1.

Again, I do not accept that Dr. Castiello's, and Dr. Millheiser's opinions rule out that injuries were sustained. I discussed the inconsistencies and the internal conflicts within Dr. Castiello's opinions. If Dr. Millheiser's testimony is read to infer that no injury occurred, I discount that opinion.

With respect to the allegations of mental disorder, in order to invoke the presumption, the claimant must prove not only that he has an impairment, but that an accident occurred or working conditions existed which could have caused the impairment. ***Adams v. General Dynamics Corp***., 17 BRBS 258 (1985); ***Kelaita v. Triple A Mach. Shop***, 13 BRBS 326 (1981), *decision and order after remand*, 17 BRBS 10 (1984), *aff'd sub nom.* ***Kelaita v. Director, OWCP***, 799 F.2d 1308 (9th Cir. 1986).

Therefore, after a review of the entire record, I accept that an injury occurred. The nature of that injury and issues of permanency are discussed below.

Shifting Burden and Causation

Once the claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain, the burden shifts to the employer to establish that the claimant's condition was not caused or aggravated by the employment. ***Brown v. Pacific Dry Dock***, 22 BRBS 284 (1989); ***Rajotte v. General Dynamics Corp***., 18 BRBS 85 (1986); ***Hughes v. Bethlehem Steel Corp***., 17 BRBS 153 (1985).[35]

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[34] The Board will not interfere with credibility determinations made by an ALJ unless they are "inherently incredible and patently unreasonable." ***Cordero v. Triple A Machine Shop***, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 **U.S.** 911 (1979); ***Phillips v. California Stevedore & Ballast Co.***, 9 BRBS 13 (1978).

[35] If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. ***Del Vecchio v. Bowers***, 296 U.S. 280 (1935); ***Volpe v. Northeast Marine Terminals***, 671 F.2d 697 (2d Cir. 1982). In ***Sinclair v. United Food & Commercial Workers***, 23 BRBS 148 (1989), the Board, in discussing the parameters of the Section 20(a) presumption, stated that the presumption applies to the issue of whether an injury is

Employer/Carrier does not dispute that the working conditions at the Port of Miami could have caused the injury.

Employer/Carrier offers the testimony of Employer/Carrier expert medical witnesses to rebut the Claimant's allegations the causation for his of physical complaints, and alleges that even if the Claimant may be impaired, all of the evidence relates to pre-existing conditions and earlier accidents. Dr. Herskowitz and Dr. Millheiser find that there is no evidence of a *permanent* impairment relating to the neck, wrist, back or knees stemming from the fact pattern presented by the Claimant. As I had set forth above, this does not mean that they affirmatively refute that there had been impairments requiring treatment to those parts of the anatomy post accident and prior to MMI. A close reading of their reports and testimony shows that they do not rule out that there was soft tissue damage that may have resulted from the accident. According to Dr. Herskowitz, all of the complaints, "... related to pain and not to actually damaged nerves." Tr. at 146. Pain, standing alone, can be disabling. ***Quinones v. H.B. Zachery, Inc***. 32 BRBS 6 (1998). I note that Dr. Millheiser also did not dismiss that there had been soft tissue damage. Ex 35, 57. And a close reading shows that they do not rule out that the soft tissue damage was caused by the accident.

In this instance, I note that all of the medical opinions, save Dr. Castiello, agree that injuries occurred to the neck, back and knees, and Dr. Castiello is a psychiatrist and I note that his expertise does give him special insight into causation of physical injury. There is no evidence to show that in any way that the Claimant was delusional and merely imagined that the accident had occurred on the evening of March 26, 2001. I note that all of the treating physicians find, moreover, that there is a permanent condition caused by the accident to the neck, back, and knees, and that these impose restrictions on the Claimant's ability to perform work related activities.

After a review of all of the evidence, I accept that the accident caused these injuries. All of the examining physicians, including Dr. Millheiser and Dr. Herzkowitz, relate soft tissue injury to the accident. I give significant weight to Dr. Khrimshtein's opinion, because it is more consistent with the great weight of the evidence.

In fact, based on the totality of the evidence, the Claimant has proved all of the elements of a Longshore Act claim, without necessity of needing the Section 20(a) presumption.

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causally related to employment and the Board rejected the employer's argument that the presumption does not apply unless the claimant establishes that her psychological condition is caused by a psychiatric reaction to the physical symptoms she suffered while at work, and held that the claimant need not affirmatively prove causation. Once the claimant establishes the elements of a prima facie case, i.e., the existence of physical harm and working conditions which could have caused such harm, the presumption provides the causal nexus. The Section 20(a) presumption attaches only to claims actually made. ***U.S. Indus./Fed. Sheet Metal v. Director, OWCP***, 455 U.S. 608, 14 BRBS 631 (1982), *rev'g* 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980). Thus, a prima facie claim must at least allege an injury that arises out of and in the course of employment. In Sinclair, the claimant specifically alleged that her exposure to chemicals at work aggravated her pre-existing psychiatric condition, resulting in a permanent psychiatric disability insofar as claimant can no longer work around chemicals

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. ***Johnson v. Newport News Shipbuilding & Dry Dock Co.***, 25 BRBS 340 (1992); ***Lobus v. I.T.O. Corp. of Baltimore***, 24 BRBS 137 (1990); ***Orkney v. General Dynamics Corp***., 8 BRBS 543 (1978); ***Barber v. Tri-State Terminals***, 3 BRBS 244 (1976), *aff'd sub nom*. ***Tri-State Terminals v. Jesse***, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

A percentage of the employee's average weekly wage is the claimant's compensation rate, subject to the maximum and minimum compensation rates established under Section 6. See, e.g., ***Empire United Stevedores v. Gatlin***, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); ***Duncanson-Harrelson Co. v. Director, OWCP***, 686 F.2d 1336 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983); ***Turney v. Bethlehem Steel Corp***., 17 BRBS 232 (1985). There is only one average weekly wage upon which payments of compensation for a single injury may be based, whether the disability for which compensation is payable is characterized as temporary or permanent, partial or total. ***James v. Sol Salins, Inc***., 13 BRBS 762 (1981) (reversing
separate average weekly wage findings for temporary total and permanent partial disability). See ***Thompson v. Northwest Enviro Servs***., 26 BRBS 53 (1992); ***Merrill v. Todd Pac. Shipyards Corp***.,25 BRBS 140, 150 (1991).

The average weekly wage should not be reduced by the effective income tax rate. ***Denton v. Northrop Corp***., 21 BRBS 37, 47 (1988); see 26 U.S.C. § 104 (a)(1) (personal injury awards are
excluded from gross income for federal personal income tax purposes).

Under Section 2(13), wages are defined as

> ... the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. § 3101 et seq.](relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. § 902(13).

The Employer/Carrier determined that Mr. Lewis's correct average weekly wage is based upon fifty two (52) weeks of earnings totaling $67,992.42.

Claimant agues that the calculation failed to note the following:

- Firstly, the Employer/Carrier did not include the sum of $382.50 for the Employer Florida Stevedoring, labeled E-20/E-019.
- Secondly, the E/C arrived at the wage for Oceanic Stevedoring for the year 2000 by subtracting the yearly total gross (hereinafter YTD/G) from E20/E-020 for, period ending 04/05/00, in the amount of $4,646.00, from the YTD/G of E20/E-040 for

period ending 12/20/00, in the amount of $11,590.16, which comes out to $6,944.16. This figure is represented as E21/E-012 and further labeled by us as # 6. We believe that the E/C erred by not including the wages earned for period ending 4/05/00 in the amount of $343.00.

- Thirdly, the E/C calculated the wages for Oceanic Stevedoring for the year 2001 under E21/E-025, for period ending 03/14/01, by using the YTD/G in the amount of $1,383.38. This is also represented as E21/E0-12, and labeled by us as #7. We believe the correct amount should have been E21/E026 which shows YTD/G in the amount of $1,740.38. The difference amounts to $357.00.
- Fourthly, the E/C calculated the wages for Eller-ITO Stevedoring for the year 2000 by subtracting the YTD/G from E21/E-027, for the period ending 03/29/00, in the amount of $922.00, from the YTD/G of E21/E-33, for period ending 12/20/00, in the amount of $9,485.00, which comes out to $8,563.50. This figure is represented as E21/E-01 2, and further labeled by us as #8. We believe the E/C erred by not including the wages earned for the period ending 03/29/00, in the amount of $232.75.
- Fifth, the E/C calculated the wages for Universal Maritime Service Corp for the year 2000 by subtracting the YTD/G from E21/E-038, for the period ending 03/29/00, in the amount of $2,272.38, from the YTD/G of E21/E-050, for period ending 12/20/00, in the amount of $26,520.91, which comes out to $24,248.53. This is also represented as E21/E-012, and labeled by us as #10. We believe the E/C erred by not including the wages earned for the period ending 03/29/00 in the amount of $294.00.

Claimant asserts that the annual wage calculation should be increased $1,609.25.[36]

In addition, the Employer/Carrier argues that nature of the container royalty and holiday/vacation payments were not developed by the Claimant.[37] In general, vacation or holiday pay (calculated the year it is received rather than the year it is earned) is included as wages. ***Sproull v. Stevedoring Servs. of America***, 25 BRBS 100 (1991); ***Duncan v. Washington Metro. Area Transit Auth.***, 24 BRBS 133, 136 (1990); ***Rayner v. Maritime Terminals***, 22 BRBS 5 (1988); ***Waters v. Farmers Export Co.***, 14 BRBS 102 (1981), *aff'd per curiam*, 710 F.2d 836 (5th Cir. 1983). Employer/Carrier has not advised why the general rule should not apply in this situation. The information set forth in Ex 20 and 21 establish the nature of the payments and the purpose for them. The party contending actual wages are not representative bears the burden of producing

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[36] "This should increase the 52 week earnings listed in E21/E-012 from $67,992.42, up to $69,601.67. This would raise the average weekly wage compensation rate (hereinafter AWW/CR) to $1,338.49/892.33." See Claimant's Brief.

[37] It argues that there may actually be an overpayment situation depending on the my "treatment" of these payments. It also argues that a "holiday check" paid March 27, 2001, the day after the accident, should also not be included. See Brief.

supporting evidence. ***Todd Shipyards Corp. v. Director, OWCP***, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), aff'g and remanding in part 1 BRBS 159 (1974); ***Riddle v. Smith & Kelly Co.***, 13 BRBS 416, 418 (1981).

In making the AWW calculation, I accept that the Employer indeed failed to credit sums earned at Florida Stevedoring ($382.50) and Ocean Stevedoring ($343.00 for period ending April 5, 2000 and $357.00 for the period ending March 14, 2001) that fall within the calendar year March 26, 2000 to March 26, 2001. It is reasonable from the face of the documents in Ex 20 and Ex 21, without further showing, that these amounts were for work within the period of evaluation. See ***Todd Shipyards Corp. v. Director, OWCP***, *supra*. Conversely, I do not credits amounts earned in 2000 for earnings from Eiler-ITO or Universal Maritime Service Corp because the Claimant failed to establish through any proof, that these amounts were earned within the prior calendar year. Id. After a review of the entire record, I accept that the Claimant's annual wage for the year prior to injury was $69,074.92[38] and that the Claimant's average weekly wage under Section 10 (d)(2) was $1328.38.

Strike Fund

The Claimant argues that income received from a strike fund on 12/09/00, labeled E21/E-056, in the amount of 4,648.40 must be included as wages.[39]

Employer/Carrier argues that the strike fund check for $4,648.40 was properly excluded as the Claimant did not submit any evidence that those funds were a money rate of compensation provided for an employee's services by an employer under an employment contract; nor did the Claimant submit any evidence that those funds were earned through actual work. ***Universal Maritime Services Corp. v. Wright***, 155 F.3d 311 (4th Cir., 1998).

To be considered "wages", the money must be received from the employer. 33 U.S.C. § 902(13).. ***Lopez v. Southern Stevedores***, 23 BRBS 295, 301 (1990); ***Rayner v. Maritime Terminals***, 22 BRBS 5, 9 (1988); ***McMennamy v. Young & Co.***, 21 BRBS 351, 354 (1988).

The Claimant failed to develop any evidence showing that the strike fund is "wages" rather than "fringe benefits". 33 U.S.C. § 902(13).

Maximum Medical Improvement

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be "permanent," is primarily a question of fact based on medical evidence.

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[38] $67,992.42 + $382.50 +$343.00 + $357.00 = $69,074.92.

[39] "When you include that figure, the 52 week earnings go up to $74,250.07. This would raise the AWW/CR to $1 ,427.89/951 .92 (933.82 max comp rate for that year). This is our position regarding the Claimant s correct AWW/CR.

"As a result of the above mentioned adjustment to the AWW/CR, the Employer/Carrier has underpaid past benefits between 03/27/01 through 08/27/01, in the amount of $1,366.86, plus penalties and interest. It is also our position that the Claimant is also owed disability benefits between 08/28/01 through present (05/07/03), in the amount of $83, 109.98(89 weeks at $933.82/week), plus penalties and interest." See Claimant's Brief.

Lozada v. Director, OWCP, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); ***Hite v. Dresser Guiberson Pumping***, 22 BRBS 87, 91 (1989); ***Care v. Washington Metropolitan Area Transit Authority***, 21 BRBS 248 (1988); ***Wayland v. Moore Dry Dock***, 21 BRBS 177 (1988); ***Eckley v. Fibrex and Shipping Company***, 21 BRBS 120 (1988); ***Williams v. General Dynamics Corp***., 10 BRBS 915 (1979). The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition becomes permanent is primarily a medical determination, regardless of economic or vocational considerations. ***Manson v. Bender Welding & Machine Co.***, 16 BRBS 307, 309 (1984); ***Louisiana Insurance Guaranty Association v. Abbott***, 40 F. 3d 122 (5th Cir. 1994)(doctor said nothing further could be done); ***Ballesteros v. Willamette Western Corp***., 20 BRBS 184, 186 (1988). Medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. ***Trask v. Lockheed Shipbuilding & Construction Co.***, 17 BRBS 56, 60 (1985). A date of permanency may not be based, however, on the mere speculation of a physician. See ***Steig v. Lockheed Shipbuilding & Construction Co.***, 3 BRBS 439, 441 (1976). Furthermore, evidence of the ability to do alternate employment is not relevant to the determination of permanency. ***Berkstresser v. Washington Metro. Area Transit Authority***, 16 BRBS 231, 234 (1984), rev'd on other grounds sub nom., Director, OWCP v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990). An Administrative Law Judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. ***Thompson v. Quinton Engineers***, 14 BRBS 395, 401 (1985). In the absence of any other relevant evidence, the judge may use the date the claim was filed. ***Whyte v. General Dynamics Corp***., 8 BRBS 706, 708 (1978).

Dr. Gordon, the authorized treating physician, determined that the Claimant reached MMI on August 10, 2001. when he rendered the following diagnosis:

- Cervical spine sprain.
- Right cervical radiculitis.
- Cervical spinal osteoarthritis.
- Lumbar spine sprain.
- Acute sprain of the right knee joint.
- Chrondromalacia right patella-femoral joint.
- Osteoarthritis of right knee joint.
- Acute sprain of the left knee joint.
- Chrondromalacia left patella—femoral joint.

See reports attached to Cx 1. He determined:

> As the patient has reached maximum medical improvement, I feel that he is left with the following permanent disabilities: As a result of his cervical injury, 3% of the whole body. As a result of his lumbar spine sprain, 3% of the whole body. As a result of the injury to the right knee, 10% of the right knee. As a result of the injury to the left knee, 5% of the left knee. If all of these disabilities were to be combined, he would have an overall total disability of 10% permanent disability of the whole body.

Id. Also at Ex 5, at 289.

Dr. Kohrman determined that Mr. Lewis' condition had reached MMI as of the date on his examination, October 25, 2002. Cx 4.

Dr. Boza, who is managing the Claimant's psychiatric treatment, was not asked whether the Claimant had reached MMI. Cx 3. In ***Jenkins v.Kaiser Aluminum & Chem. Sales***, 17 BRBS, 183 (1985), the Board addressed a similar case and stated that before an injured worker's condition can be found to be permanent, both physical and mental factors must be considered. In ***Jenkins*** the Board held where the employee suffered both physical and emotional trauma and needed physiological treatment before he could return to work, he was not yet at the point of maximum medical improvement and was still considered disabled due to the psychological effects of his injury. ***Jenkins*** at 187.

An injured worker's impairment may be found to have changed from temporary to permanent under either of two tests. ***Eckley v. Fibrex & Shipping Co.***, 21 BRBS 120, 122-23 (1988). Under the first test a residual disability, partial or total, will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement (MMI). ***James v. Pate Stevedoring Co.***, 22 BRBS 271, 274 (1989); ***Phillips v. Marine Concrete Structures***, 21 BRBS 233, 235 (1988); ***Trask v. Lockheed Shipbuilding & Constr***. Co., 17 BRBS 56, 60 (1985). Thus, an irreversible condition is permanent per se. ***Drake v. General Dynamics Corp., Elec. Boat Div***., 11 BRBS 288, 290 n.2 (1979).The date of the diagnosis of an irreversible medical condition is the date of permanency. ***Crouse v. Bath Iron Works Corp***, 33 BRBS 442(ALJ)(May 4, 1999), see also, ***Drake v. General Dynamics Corp***., 11 BRBS 288(1979)(Held, an irreversible medical condition is permanent per se.).

Under the second test a disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. ***Watson v. Gulf Stevedore Corp***., 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). See also ***Crum v. General Adjustment Bureau***, 738 F.2d 474, 480 (D.C. Cir. 1984) (physician's evaluations of claimant indicated that his heart condition, although improved, was of indefinite duration); ***Air America, Inc. v. Director, OWCP***, 597 F.2d 773, 781-82 (1st Cir. 1979); ***Care v. Washington Metro. Area Transit Auth***., 21 BRBS 248, 251 (1988). In such cases, the date of permanency is the date that the employee ceases receiving treatment, with a view toward improving his condition. ***Leech v. Service Eng'g Co.***, 15 BRBS 18, 21 (1982).

If there is any doubt as to whether the employee has recovered, such doubt should be resolved in favor of the claimant's entitlement to benefits. ***Fabijanski v. Maher Terminals***, 3 BRBS 421, 424 (1976), *aff'd mem. sub nom*. ***Maher Terminals, Inc. v. Director, OWCP***, 551 F.2d 307 (4th Cir. 1977). But see ***Maher Terminals, Inc. v. Director, OWCP***, 992 F.2d 1277, 27 BRBS 1 (CRT) (3d Cir. 1993), *cert. granted sub nom*. ***Director, OWCP v. Greenwich Colleries***, 510 U.S. 1068 (1994).

Initially, Dr. Gordon treated Mr. Lewis for mental problems, headache, pain and restriction of motion in the left wrist, both knees, and the back (cervical, thoracic and lumbar), and loss of balance. Tr. at 273. A review of the entire record shows that the mental condition will never improve. Dr. Boza estimated that by July 24, 2001, the Claimant manifested signs of post traumatic stress. Cx 3 at 9 - 10. Dr. Storper saw the Claimant on November 9, 2001 and reported that he had been impaired before that. Cx 10. I do not accept Dr. Gordon's opinion that the

Claimant reached MMI as of August 10, 2001 because other records show that the Claimant had an acute mental condition at that time. Under both tests set forth above, the mental condition is apparently irreversible, or alternatively will be expected to last for an indefinite duration. Therefore, I find that as of the date of first treatment for post traumatic stress, July 24, 2001, the Claimant's combination of physical and mental impairments consisting of an aggravation of paranoid schizophrenia and post traumatic stress disorder, were not going to significantly improve, and find that maximum medical improvement was reached as of that date.

Medical Profile

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. ***Trask v. Lockheed Shipbuilding Construction Co.***, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. ***Sproull v. Stevedoring Servs. of America***, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity. Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. ***Watson v. Gulf Stevedore Corp***., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); ***SGS Control Services v. Director, OWCP***, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. ***Trask***, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. ***Berkstresser v.Washington Metropolitan Area Transit Authority***, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. See ***Pietrunti v. Director, OWCP***, 119 F.3d 1035, 1041, 31 BRBS 84, 91 (CRT) (2d Cir. 1997); ***Palombo v. Director, OWCP***, 937 F.2d 70, 76 (2d Cir. 1991); ***Quick v. Martin***, 397 F.2d 644 (D.C. Cir 1968); ***Eastern S.S. Lines v. Monahan***, 110 F.2d 840 (1st Cir. 1940); ***Rinaldi v. General Dynamics Corporation***, 25 BRBS 128, 131 (1991). To establish a prima facie case of total disability, the claimant must show that an inability to return to regular or usual employment due to her work-related injury. See ***Palombo***, supra, at 73; ***American Stevedores, Inc. v. Salzano***, 538 F.2d 933, 935-936 (2d Cir. 1976); ***Elliott v. C & P Telephone Co.***, 16 BRBS 89 (1984); ***Harrison v. Todd Pacific Shipyards Corp***., 21 BRBS 339 (1988); ***Louisiana Insurance Guaranty Association v. Abbott***, 40 F.3d 122, 125 (5th Cir. 1994).

Thus, the extent of disability cannot be measured by physical or medical condition alone. ***Nardella v. Campbell Machine, Inc.***, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the

injury. ***American Mutual Insurance Company of Boston v. Jones***, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266). Under this standard, an employee will be found to either have no loss of wage-earning capacity, no present loss but with a reasonable expectation of future loss (*de minimis*), a total loss, or a partial loss.

Claimant's present medical restrictions must be compared with the specific requirements of the usual or former employment to determine whether the claim is for temporary total or permanent total disability. I must compare the claimant's medical restrictions with the specific requirements of his usual employment. ***Curit v. Bath Iron Works Corp.***, 22 BRBS 100 (1988); ***Mills v. Marine Repair Serv***., 21 BRBS 115, *on recon*., 22 BRBS 335 (1988); ***Carroll v. Hanover Bridge Marine***, 17 BRBS 176 (1985); ***Bell v. Volpe/Head Constr. Co.***, 11 BRBS 377 (1979).

In order to make the comparison between the duties of former employment with the Claimant's current capacity, the residual functional capacity[40], I must discuss the Claimant's medical profile. Again, I am not bound to accept the opinion or theory of any particular medical examiner, rather I may rely upon
my personal observation and judgment to resolve conflicts in the medical evidence. ***Todd Shipyards Corp. v. Donovan***, *supra*; ***Ennis v. 0'Hearne***, *supra*.

Physical

In determining the Claimant's residual functional capacity on a physical basis, I will consider the Claimant's capacity to perform the following activities:

a. Standing, Walking, Sitting.

Standing - Remaining on one's feet in an upright position at a work station with-out moving about.

Walking - Moving about on foot.

Sitting - Remaining in a seated position.

b. Lifting, Carrying, Pushing, Pulling.

Lifting - Raising or lowering an object from one level to another (includes upward pulling).

Carrying - Transporting an object, usually holding it in the hands or arms, or on the shoulder.

Pushing - Exerting force upon an object so that the object moves away from the force (includes slapping, striking, kicking, and treadle actions).

Pulling - Exerting force upon an object so that the object moves toward the force (includes jerking).

Lifting, pushing, and pulling are evaluated in terms of both intensity and duration. Consideration is given to the weight handled, position of the worker's body, and the aid

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[40] What a person can still do despite limitations. ***Wilson v. Barnhart***, 284 F.3d 1219 (11th Cir. 2002); ***Hale v. Bowen***, 831 F.2d 1007 (11th Cir., 1987); ***Lowe v. Apfel***, 226 F.3d 969, 972 (8th Cir. 2000) For an analogy, see 20 CFR §404.1545, 20 CFR § 416.945.

given by helpers or mechanical equipment. Carrying most often is evaluated in terms of duration, weight carried, and distance carried.

DOT, Appendix C, Section IV.

Estimating the strength factor rating for an occupation requires the exercise of care on the part of occupational analysts in evaluating the force and physical effort a worker must exert. For instance, if the worker is in a crouching position, it may be much more difficult to push an object than if pushed at waist height. Also, if the worker is required to lift and carry continuously or push and pull objects over long distances, the worker may exert as much physical effort as is required to similarly move objects twice as heavy, but less frequently and/or over shorter distances. Id.

Both the Medical and Vocational experts refer to the claimant's exertional strength, expressed by one of five terms: Sedentary, Light, Medium, Heavy, and Very Heavy. Id. The DOT describes "heavy" as exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects. Id.

Wrists and Hands

Although the Claimant had a history of carpal tunnel syndrome and injured the wrists in the accident, none of the treating physicians note any permanent condition arising from the accident. He also had a prior injury to fingers on the right hand. I note that the Claimant wore wrist supports at hearing and in the videos wore a splint on the left wrist. The record shows that Dr. Gordon treated the Claimant for restriction of motion of the left wrist. However, the Claimant failed to present any substantiating evidence, apart from his testimony that the wrists and/or hands and fingers are permanently impaired.[41] None of the physicians submitted any restrictions as to grip strength, hand dexterity or any other functional deficit. Therefore, based on a review of the entire record, I do not accept that the Claimant has established a credible permanent condition, and I find that the hands and wrists are not impaired.

Neck and Back

The Claimant testified that he has excruciating pain that extends down the spine. He also described radicular pain, into the legs, knees and feet. He has a history of shoulder pain and is status post shoulder surgery. He asserts it formerly was painful to move the head to the left; but after this accident, it is painful bilaterally, more so to the right. Mr. Lewis asserted that he is in constant pain and that because he is limited to taking only Tylenol, the pain never goes away completely. He testified that at times he needs assistance to get out of bed or to take a bath by himself. Tr.at 277. He testified that he has pain that goes from the right hip to the foot. Tr. at 277. He said that the leg becomes completely numb. Id. He also has had pain that shoots from the shoulder down the arm, into the hand. Id., 278. He also alleges constant pain in the knees. Id. Dr. Gordon treated him with hot packs and physiotherapy. The Claimant has a sensitivity to many pain

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[41] Mr. Lewis admitted that prior to the incident, he wore wrist supports. Tr. at 304. At one time he had described the wrists as so swollen that he was crippled. Id. at 305. The wrists were diagnosed as arthritic by the Veterans' Administration. Id. 306. In 1986, in his claim against the Postal Service, he alleged that he could not drive a car using his fingers as a result. Id. at 306 - 307. He also has had pain that shoots from the shoulder down the arm, into the hand. Id., 278. However, he did not develop evidence to show that this is a recurring problem.

medications, and although some were tried, the Claimant is not completely pain free, even on medication.

Although the majority of the experts determined that the Claimant is totally disabled due to a herniated disk with radiculopathy, confirmed by the MRIs, I give significant weight to the opinions of Dr. Millheiser and Dr. Herskowitz on this issue, who note the absence of the cardinal signs of atrophy and diminishment of reflex action. In testimony, Dr. Gordon acknowledged there was normal sensation and motor power in the upper extremities and that usually rules out nerve damage. No atrophy and normal reflexes were found. Dr. Gordon had the best opportunity to examine the Claimant and record his observations. His initial rating related to permanent soft tissue in the neck and back.

Dr. Krimshtein noted myofacial problems based on spasm that were not pre-existing, and that generate a rating of ten per cent (10%) for the cervical and lumbar regions.

On examination, Dr. Kohrman noted spasm in the neck and back with limited rages of motion in those areas.

The knees will be dealt with separately.

The treating physicians, as well as Dr. Beitler noted that the Claimant had spasm on palpation, whereas Drs. Herzkowitz and Millsheiser did not.

After a review of all of the evidence, I accept that although the Claimant may have multiple disk herniations, there is no functional basis for them. I discount the Clamant's complaints of pain as to the extent that he is bedridden and needs assistance to perform his daily regimen. I also note that the Claimant failed to develop whether the Claimant was restricted to postural limitations such as sitting and standing.

On the other hand, I give significant weight to Dr. Krimshtein's opinion regarding a myofacial permanency. This is substantiated by the office notes and reports of Dr. Gordon and those of the VA Hospital. . As I had stated earlier, in testimony, even Dr. Millheiser admitted that as of the date of injury, the claimant has strains and sprains that required medical attention and medical treatment.[42] He did not fully consider whether the Claimant has permanent strains ans sprains, because he discounted all of the Claimants complaints. Even if the Claimant is not entirely credible, it is my function and not that of a witness to determine credibility.

Other than Dr. Kohrman, none of the experts specifically addressed the Claimant's ability to perform such functions as pushing, pulling and even lifting or carrying. As Dr. Kohrman's assessment is based on an assertion that the Claimant is impaired due to herniation of the disks and radiculopathy, I discount his opinion.

Therefore, after a review of the entire record, I accept that the Claimant can not perform the lifting required of "heavy" work due to a myofacial syndrome, but the Claimant bears the burden of proof to show that he has restrictions, and he has failed to meet this burden as to those attributed to the neck and back.

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[42] Dr. Millheiser, who testified that although the Claimant has all of the attributes of a malingerer, advised that he believed that the Claimant suffered sprains as a result of the accident. Ex 35 at 57.

Knees

Dr. Gordon, the Claimant's first choice treating physician rendered two opinions. As of the date he determined that the Claimant had met maximum medical improvement, August 16, 2001, Dr. Gordon determined that the Claimant had a rating due to the accident of 10% permanent disability of the whole body based on the AMA Guides. I note that he gave the claimant a rating to both knees.

Later, after a review of the MRIs, and after a re-examination in November, 2002, he determined that the injuries resulted in a whole body impairment of forty per cent (40%) in accordance with the AMA Guides to impairment (5th edition).

Dr. Pritchard testified that the injuries resulted in a permanent impairment rating of nineteen to twenty per cent (19 to 20%) to the body as a whole, in accordance with the AMA Guides to permanent impairment (5th edition). Dr. Pritchard testified that accident resulted in an aggravation of the preexisting injuries to both knees, resulting in a need for arthroscopic surgery to both knees, and caused an acceleration of the arthritic process resulting in the accelerated need for Mr. Lewis to undergo a total knee replacement.

Dr. Beitler determined that the "essential" problem is the knee problem and on this basis alone determined that the Claimant can not work as a longshoreman. He noted that the right knee is probably going to require either fusion or replacement in the future, based on large part on X-ray. Cx 11.

Dr. Krimshtein determined that the Claimant has a 25% impairment based on the AMA guides. Dr. Krimshtein opined that Mr. Lewis will require ongoing palliative care and treatment in the form of physiotherapy and, most likely, total knee replacement.

Dr. Kohrman testified that Mr. Lewis has a permanent impairment to the whole body of between twenty four and twenty eight per cent (24 to 28%) related to the accident. Dr. Kohrman felt that Mr. Lewis was unable to perform any repetitive lifting, bending, squatting, pushing or pulling and that he should not lift more than 10 pounds.

Dr. Herskowitz' determined that the Claimant did not sustain permanent neurological injuries as a result of the accident. He also would not place any restrictions on the Claimant as a result of the accident. Therefore, according to Dr. Hertzkowitz, the Claimant can work as a longshoreman.

Dr. Millheiser determined that the Claimant had no rating related to the accident. He also concluded that the only treatment needed was anti-inflammatory drugs for the right knee. However, he determined that any impairment to that knee was from pre-existing sources.

Employer/Carrier argues the surveillance videos depict the Claimant as an "active" individual with the ability to lift, carry, walk, grasp, drive and turn his head in an essentially normal fashion. (Ex 26 and 27). The argument is that the videos also show Mr. Lewis placing very little, if any, weight on his crutches, as Mr. Chamblin testified at the formal hearing.

Based on a review of the entire record. I accept that the Claimant can not lift heavy objects and can not perform heavy work. I credit Dr. Herzkowitz' and Dr. Millheiser's opinions that the Claimant does not have nerve entrapment from multilevel disk herniations and that the Claimant is not entirely credible on this issue. However, I discount both opinions as to exertional capacity as they are contrary to the weight of the evidence as to the knees. Dr. Pritchard, who is as qualified as Dr. Herskowitz and Dr. Millheiser, had an opportunity to evaluate the Claimant before and after

March 26, 2001. He notes that the incident aggravated the Claimant's pre-existing condition. He relied in part on an MRI scans which show bilateral knee damage.

From what I saw on the video, I agree that the Claimant was observed walking short distances without need for the crutches. I note that he was not prescribed crutches by any medical provider. I saw him driving a car and ostensibly performing errands, carrying small objects. I also note that he was able to lift the box at Sears, that I had described previously. During the hearing, the Claimant provided a box as demonstrative evidence, and no evidence was adduced to show that the box was"heavy", in that it weighed as much as fifty pounds. The Claimant was prescribed an electric wheel chair by the VA, and although I note that fact, I do not accept that the Claimant is precluded from all ambulation.

I note that Dr. Beitler, Krimstein, and Kohrman substantiate that there is damage to the knees. Even Dr. Millheiser noted that the Claimant "obviously" has a "significantly" arthritic knee, but he was, apparently, able to work until March of 2001 and was, apparently, doing heavy work. However, he limited his opinion to the left knee, whereas the MRI of the right knee shows that the Claimant has an advanced grade IV chondromalacia of the patella femoral articulation of the right knee with an area of suggested osteonecrosis in the medial articular surface of the medial femoral condyle. According to the MRI reports, there is thinning of the cartilage within the medial joint space compatible with post-traumatic chondromalacia. The menisci show post-surgical changes. Ex 14, Ex 5, 394 - 406, Ex 6 at 378 - 402 See Dr. Pritchard's discussion in Cx 2 and Ex 5. Moreover the MRI of the left knee which suggests the possibility of a recurrent tear of the posterior horn of the medial meniscus with post-traumatic chondromalacia of the patella femoral articulation. Id.

Although all of the other witnesses on this point are partisan, in that they were called by the parties, Dr. Beitler is truly an independent witness. His report substantiates Dr. Pritchard's opinion as to the aggravation to the knees that reasonably places restrictions on the Claimant's ability to walk.

Although the Claimant alleged that he needs an electric wheelchair to ambulate and otherwise needs to use crutches, I discount this testimony. I also discount his allegation that he has completely disabling pain, as there are many inconsistencies with his testimony.

I give greater credit to the opinion of Dr. Priitchard than to either Employer witness as to the claimant's restrictions to the knees. I find his opinion to be more rationally based, as he relied on objective testing to form his conclusion. Dr. Gordon, the treating physician also gave a rating for both knees, even before seeing the MRI studies, based on the following diagnoses:

- Acute sprain of the right knee joint.
- Chrondromalacia right patella-femoral joint.
- Osteoarthritis of right knee joint.
- Acute sprain of the left knee joint.
- Chrondromalacia left patella—femoral joint..

Cx 1. I credit these conclusions to the extent that the Claimant has permanent injury to the knees. Significant weight is also attributed to the opinions of Drs. Beitler, Krimstein, and Kohrman with respect to the fact that there is damage to the knees bilaterally. I do not accept Dr. Kohrman's opinion that Mr. Lewis is unable to perform *any* repetitive lifting, bending, squatting, pushing or pulling and that he should not lift more than 10 pounds However, I accept that the Claimant does

have restrictions to lifting heavy objects. I accept that Dr. Kohrman is correct as to squatting and to an extent as to bending.

For reasons set forth above, I specifically discount the opinions of Drs. Millheiser and Herskowitz as to their opinions that there are no restrictions to the knees. Dr. Herskowitz noted an antalgic gait, with limping. Although he dismissed these observations, the record shows that the Claimant is status post knee surgery, and that he has been treated for bilateral knee pain, and that there are increases on MRI from prior treatment. I had the opportunity to reviewed the videos and in what must be considered to be unguarded moments, the Claimant was limping. It is clear from a review of the complete record that the Claimant has a restriction to extensive walking.

Although I do not accept that the Claimant is completely restricted from walking, it is more rational that the Claimant can walk short distances, but that he can not walk carrying "heavy" objects or walk continuously throughout a work day.

Although I accept that the Claimant can perform the lifting required in "light" work, I note that he can not perform the extensive walking and carrying required by light work.[43] I also find that he should not perform crouching or kneeling or perform excessive bending due to the knee problems. However, I accept that the Claimant has the residual functional capacity to perform sedentary work. The DOT defines it as exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met. Id.

Vision

After the 1991 accident, Mr. Lewis began to have problems with the vision in the right eye. Tr. at 318. He subsequently was treated at Bascom Palmer Eye Institute.[44] On October 25, 2002, Dr. Hamburger found that Mr. Lewis is suffering from a 90% field loss in the right eye. (Id. at 11). He noted the presence of a cataract. Dr. Hamburger opined that Mr. Lewis had a 50% loss of field

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[43] Light work is defined as exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible. DOT Appendix C, Section IV.

[44] Ann Bates Leach Eye Hospital, part of the Jackson Memorial Hospital complex affiliated with the University of Miami School of Medicine. Ex 31, p. 2.

vision in the right eye prior to the March 26, 2001 incident. This opinion is based in large part on the MRI taken by Dr. Kay, who opined that the Claimant had a five to six percent impairment (5% to 6%) of the whole person caused by the March 26, 2001 incident. Dr. Hamburger advised that the pre-existing condition made the Claimant more susceptible to injury. He admitted that all strikes to the head do not cause vision loss, but advised that the right nerve had a prior insult and it was affected and the left was healthy but was not. Id. at 24. He stated that this was definitely not as a result of degeneration. He also testified that there was atrophy prior to the incident and there was more atrophy measured after the accident. He stated that this is an objective finding.

The Employer expert, Dr. Trattler, agreed that the Claimant has a deficit in the right eye and that there is a "profoundly" restricted visual field,[45] but determined that all of the degeneration in the eye stemmed from the 1990 accident.

Both Dr. Hamburger and Dr. Trattler agree that if the Claimant did not have stereoscopic vision, he could not return to work as a commercial driver. Ex 31 at 67 - 68. There is a dispute whether there is actually more atrophy measured post accident, in the right eye, and there is a dispute whether natural deterioration of the eye caused a reduction in the field of vision post accident. I note that Dr. Trattler was not asked whether the fact that Mr. Lewis had a pre-existing condition made him more susceptible to further injury from trauma. I note that epiretinal damage to the right eye is present in the record, and although he testified that the accident did not cause it, he admitted that it might have done so.

I note that the opinions and rationale of Dr. Kay and Dr. Hamburger are consistent. Although I am not bound by the fact that these opinions outnumber the opinion of Dr. Trattler, and should be accorded more weight on that basis, I accept that their logic is more reasonable, as it is based on the Claimant's predisposition to eye injury. I also note that Dr. Ham,burger has qualifications as a neuro- opthamologist and has special expertise in eye trauma. I find that hese factoors peersuade that I credit Dr. Hamburger's opinions.

Therefore, I accept that Dr. Kay and Dr. Hamburger's explanations are more rational, that the Claimant was predisposed to further injury and that the injury of March 26, 2001 aggravated the prior condition. Therefore, I accept that the Claimant has a restriction that precludes the driving of commercial vehicles and must wear safety goggles as a result of the March 26, 2001 accident.

Headache

After the accident, the Claimant was treated for post traumatic headache by Dr. Gordon, and these are noted as permanent by Dr. Kohrman. Although I discount Dr. Kohrman's testimony as to the effect and nature of the herniated disks and his opinion with respect to radiculopathy, no evidence has been presented by the Employer to rebut his opinion that the headache is a permanent condition related to the accident. I note that although Dr. Boza was not asked to relate headache to the accident, the Claimant did complain of headache and testified that he was given Tylenol and Celebrex., at least in part, for headache. Tr., 148.

However the Claimant failed to prove that he has any work related restrictions as a result.

Loss of Balance

[45] Ex 31, at p. 55.

The Claimant alleges that he had resultant dizziness and loss of balance. Again, he failed to prove that he has any additional restrictions. As his knee problem would restrict him from climbing ladders and his vision and knees would combine to cause him to refrain from working around dangerous machinery that has moving parts and from working at heights, I find no other restrictions.

Mental

All of the experts who discussed the subject agree that the Claimant is totally disabled due to a mental condition. However, after a revioew of the record, I accept that he has some restrictions, but not a total restricition.

The Claimant argues that this was caused by an aggravation of the pre-existing condition. The Employer/Carrier argues that the accident had nothing to do with the reason why the Claimant is disabled, rather "the evidence has shown that paranoid schizophrenia is a seriously debilitating mental illness, which, in Mr. Lewis' case, has caused delusions and auditory hallucinations." See Brief. Relying on Dr. Castiello's testimony, it is argued that not only would paranoid schizophrenics have a higher risk to manufacture a traumatic accident, but they are essentially capable of manufacturing almost anything. Dr. Castiello certainly believed that Mr. Lewis' mental condition led him to exaggerate the extent of his physical impairments.

> Therefore, although it may not be considered to be conscious on Mr. Lewis' part due to his severe psychiatric condition, various physicians in this claim agree that Mr. Lewis not only had the capability to exaggerate his injuries, but did, in fact, do so. Perhaps the Claimant's severe schizophrenia is the answer to the puzzling question as to why Dr. Boza took a history shortly after the accident stating that Mr. Lewis had simply experienced several falls and did not actually hear about the mechanics of the supposed truck accident at issue in the case at bar until almost 9 months later.

See Brief.

As I had discussed earlier, there is no doubt in the record that the Claimant had a pre-existing mental impairment prior to March 26, 2001. It is the Claimant's position that his schizophrenia was controlled by medication and/or he was in a period of remission prior to the accident. All of the competent evidence substantiates this position. Although the Claimant was in treatment at the VA for psychosis, there are no records from the Port to show that this condition in any way affected his work in the period leading to March 26, 2001. Although the Claimant's treating physician at the Veteran's Administration, Dr. Boza, had treated the Claimant with anti-psychotic drugs prior to the accident, on the evening in question, there is no evidence that he had psychotic or depressive symptoms or was in any emotional state of distress at that time. There is no evidence to show that in any way that the Claimant was delusional and merely imagined that the accident had occurred on the evening of March 26, 2001. Dr. Boza did evaluate the Claimant on several occasions prior to March 26, 2001 and did state that he was "totally disabled" prior to the accident. But it is Dr. Boza's testimony that the accident aggravated that condition. Cx 3 at 6, 11, 16, 22, 25. Prior to March 26, the Claimant was treated for paranoid schizophrenia and dysthymia. Prior to the incident, the Claimant had exercised "moderate" control. Id. at 38. After the accident, the Claimant was placed in weekly anger management sessions with a therapist. In July, 2001, Dr. Boza added the diagnosis of post traumatic stress disorder. Cx 3 at 9 - 10. Dr. Storper, also a

psychiatrist, who is neither a Claimant or Employer/Carrier witness, determined that when examined post accident, the Claimant revealed impaired judgement and "conflict" with other people, and advised that this "places him at risk". Cx 10. Dr. Castiello, the Employer/Carrier's expert, doubted very much that Mr. Lewis would be able to function in a sustained gainful employment type of situation; but stated that this was not related to any particular incident or accident. Ex 33. at 20.

Although the Employer/Carrier reminds that Dr. Boza did not have all of the records relating to the Claimant's physical treatment pre and post accident, of all other physicians in this record, Dr. Boza had the perspective of observing the Claimant's behavior and diagnosing the Claimant's mental status both before and afterward. He explained that Mr. Lewis is "compartmentalized" in his thinking, and did not fully explain how the accident had affected him until several months had passed. In addition, the record shows that the Claimant told his supervisor, his union, and both Dr. Pritchard and Dr. Gordon when the opportunity to do so was presented.

Dr. Castiello believed that the Claimant's mental condition led him to exaggerate the extent of his physical impairments. Id. at.38-39. In his opinion, Mr. Lewis' ability to form concepts, accept ideas and evaluate situations has been severely impaired; it has been twisted, changed, and modified. Id. at 39.

Based on this record, greater weight must be attributed to Dr. Boza with respect to Claimant's allegations of the narrative facts and that he had an injury on March 26, 2001 than to Dr. Castiello. I note that both are board certified in psychiatry, and I do not accept that one is more qualified than the other.

In the section of this opinion regarding whether the Claimant had made a *prima facia* case, I set forth six reasons why I accepted Dr. Boza's opinion regarding causation and discussed reasons why I find his report more credible than Dr. Castiello's opinions. I restate my contentions, especially with respect to the diagnosis of post traumatic stress. I accept the premise that the Claimant is prone to exaggeration, but as with his physical complaints, I can not completely attribute the fact that he was injured to unproved hallucinations. Likewise, I accept the Claimant's testimony that he has certain attributes of paranoia, but I do not accept that he can not take care of himself and perform daily tasks. I accept that the Claimant has some post traumatic stress that results in some degree of isolation as described by Dr. Boza. Dr. Boza, Dr. Storper and Dr. Castiello described the paranoia as all consuming, but given the rest of the testimony, a review of the medical evidence and what I observed at hearing and on the videos[46], the Claimant has a mental

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[46] In ***Phillips v. California Stevedore & Ballast Co.***, 9 BRBS 13, 16 (1978), the judge relied primarily on the medical opinion of the independent examiner that the claimant could no longer physically perform certain tasks. The Board, however, after watching the same surveillance films as the judge, reversed the award of benefits with these words:

> The movie films, however, show claimant actually engaging in many of the same physical tasks ... without any evident restriction or discomfort. It is "patently unreasonable" to believe that the claimant can mount, dismount and ride a horse but cannot climb and ascend from ships' ladders and cargoes. To reach any other conclusion is to exult fantasy over reality.

9 BRBS at 16.

residual capacity that permits some work related activities on a competitive basis. However, none of the psychiatrists laid out a complete residual functional capacity evaluation.[47]

I credit Dr. Levin's testimony with respect to the Claimant's cognitive ability and capacity. I attribute more weight to the opinions of Dr. Boza than to Dr. Castiello with respect to a residual functional capacity that I may apply to vocational matters, than to the opinions of Dr. Castiello for reasons more fully explained above. However, I do not accept that the Claimant is fully precluded from all work related activities.

The record as a whole shows that the Claimant can perform activities of daily living and can perform routine tasks, such as cleaning, shopping, cooking, driving a motor vehicle, running errands, paying bills, maintaining a residence, caring appropriately for his grooming and hygiene, using telephones and directories, using a post office, etc. However, the record, to any reasonable degree of probability, beyond substantial evidence, shows that the Claimant has a deficit in socialization and has a tendency to decompensate in work like settings when other people are involved. Dr. Boza testified that prior to the March 26, 2001 accident, Mr. Lewis had "moderate"

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[47] It is solely within my discretion to accept or reject all or any part of any testimony, as long as there is a rational basis for doing so. ***Perini Corp. v. Hyde***, 306 F. Supp. 1321, 1327 (D.R.I. 1969). In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibilityof witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. See ***Banks v. Chicago Grain Trimmers Association, Inc***., 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1969); ***McLaughlin v. Secretary of Health, Ed. and Welfare***, 612 F.2d 701, 704 (2d Cir. 1980)(quoting ***Marcus v. Califano***, 615 F.2d 23, 27 (2d Cir. 1979)) (As a fact-finder, the ALJ has "the discretion to evaluate the credibility of a claimant and to arrive at an independent judgment, in light of medical findings and other evidence."); ***Pietrunti v. Director, OWCP***, 119 F.3d 1035, 1042 (2d Cir. 2001) (quoting ***Lennon v. Waterfront Transport***, 20 F.3d 658, 661 (5th Cir.1994)) (Credibility findings of an ALJ are entitled to great deference and therefore can be reversed only if they are "patently unreasonable."); ***Scott v. Tug Mate, Inc***., 22 BRBS 164, 165, 167 (1989); ***Hite v. Dresser Guiberson Pumping***, 22 BRBS 87, 89, 91 (1989); ***Anderson v. Todd Shipyard Corp***., 22 BRBS 20, 22 (1989); ***Hughes v. Bethlehem Steel Corp***., 17 BRBS 153, 154 (1985); ***Seaman v. Jacksonville Shipyard, Inc***., 14 BRBS 148.9, 152 (1981); ***Brandt v. Avondale Shipyards, Inc***., 8 BRBS 698, 700 (1978); ***Sargent v. Matson Terminal, Inc***., 8 BRBS 564, 567 (1978); ***Duhagon v. Metropolitan Stevedore Company***, 31 BRBS 98, 101 (1997); ***Avondale 25 Shipyards, Inc. v. Kennel***, 914 F.2d 88, 91 (5th Cir. 1988); ***Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce***, 661 F.2d 898, 900 (5th Cir. 1981); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962).

control of the schizophrenia. It is reasonable, that the Claimant now has a "severe" impairment with respect to the inability to interact with others, especially supervisors and co-workers.[48]

After a review of the complete record, I find that the Claimant has a residual functional capacity that includes cognitive awareness and capability, the Claimant can adequately maintain concentration and attention, he can take care of his own activities of daily living. However I accept that the Claimant can not work in the public or be placed in a position of interpersonal relationships because he has paranoia and becomes hostile and belligerent to others.

Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. ***Palombo***, *supra*, at 73; ***Salzano***, *supra* at 935-936; ***Southern v. Farmers Export Company***, 17 BRBS 64 (1985); ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d 1031, 1038 (5th Cir. 1981). ***Palombo*** does not require that employers find specific jobs for a claimant; instead, the employer may merely establish the existence of jobs open in the claimant's community that she would compete for and realistically and likely secure; general job openings in certain fields in the surrounding community." ***Palombo***, supra at 75. Consideration must be given to the claimant's age, education, and the availability of work she can perform after the injury. ***Pietrunti***, supra, at 1041. Absent any showing of alternative work, a claimant is totally disabled within the meaning of the Act. See ***Pietrunti***, supra, at 1041; ***Salzano***, *supra*, at 935.

However, the employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. ***Piunti v. ITO Corporation of Baltimore***, 23 BRBS 367, 370 (1990); ***Thompson v. Lockheed Shipbuilding & Construction Company***, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. ***Villasenor v. Marine Maintenance Industries, Inc***., 17 BRBS 99 (1985); See generally ***Bryant v. Carolina Shipping Co., Inc***., 25 BRBS 294 (1992); ***Fox v. West State, Inc***., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co. v. Hayes, 930 F.2d 424 (5th Cir. 1991); ***Villasenor***, *supra*. Once the employer demonstrates the existence of suitable alternative employment, as defined by ***Palombo***, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. See ***Palombo***, supra, at 73; ***Pietrunti***, supra, at 1041. Thus, a claimant may sustain a relatively minor injury under the Act and be found totally

[48] The GAF scores are generally between 41 - 50, which implies "Serious symptoms OR serious impairment in one of the following: social, occupational, or school functioning". See DSM IV. In the Claimant's case, it is in the "social" rather than the "occupational" category.

disabled if the injury prevents the employee from engaging in the only type of gainful employment for which he is qualified. ***Pietrunti***, supra, at 1041.

If I find, based on medical opinions, that the claimant cannot perform any employment, the employer has not established the existence of suitable alternate employment. ***Lostaunau v. Campbell Indus.,*** 13 BRBS 227 (1981), *rev'd on other grounds sub nom*. ***Director, OWCP v. Campbell Indus.,*** 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983), *overruled by* ***Director, OWCP v. Cargill***, 709 F.2d 616 (9th Cir. 1983).

As set forth above, even if the Claimant can perform sedentary work on a physical basis, I find that the Claimant is entirely precluded from work in which the Claimant must deal with the public or interact with fellow workers frequently. The determination of the extent of the claimant's disability must be based on the claimant's vocational capabilities at the time of the hearing. ***Hayes v. P & M Crane Co.***, 23 BRBS 389 (1990), *vacated on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991).

The Employer/Carrier did not challenge the Claimant description of his job duties. I accept that Mr. Magee is correct in that the Claimant's job at the Port of Miami was longshoreman/loader-unloader, DOT Number 929.687-030, heavy-duty, semiskilled, with SVP 3.[49]

Mr. Bilski assumed that the Claimant can no longer work as a longshoreman, and testified that, given the Claimant's medical profile, the Claimant can work in a light to sedentary capacity

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[49] Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs. Specific vocational training includes training given in any of the following circumstances:

a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
b. Apprenticeship training (for apprenticeable jobs only);
c. In-plant training (organized classroom study provided by an employer);
d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months

Appendix C to DOT.

and identified such jobs that the Claimant may perform.[50] Mr. Bilski advised that all of the jobs he cited were low stress jobs. Tr., at 209.

I do not accept the medical profile used by Mr. Bilski to establish work that the Claimant can perform. Even Dr. Castiello determined that the Claimant is incapable of performing any work due to the effects of paranoid schizophrenia. I do not accept that opinion in toto, because it does not consider that the Claimant has a residual functional capacity that includes cognitive awareness and capability, the Claimant can adequately maintain concentration and attention, he can take care of his own activities of daily living, and has a residual functional capacity for work related activities that do not involve matters that would feed his paranoia. However I accept that the Claimant has a "severe" restriction to work with the public or should not be placed in a position of interpersonal relationships because he has paranoia and becomes hostile and belligerent to others.

Mr. Bilski did not submit these jobs to any of the psychiatrists, or to Dr. Levin, the psychologist. However, a review of each of the positions he cited involve dealing with the public or involves extensive interaction with co-workers. For example, Mr. Bilski recommended sales positions, which by definition involves trying to persuade other people, which Are inappropriate for a person who may become paranoid, hostile and belligerent. He suggested a front desk position at hotels; unarmed security officer positions; a survey taker position; a parking lot attendant, toll taker; quality control assistant; pawnbroker assistant; warehouse shipping and receiving clerk; sandwich maker in a restaurant; service writer for an automobile dealer; and fund raiser. An evaluation of all of these positions shows that the Claimant would be subject to supervision and/or public contact and other employee contact that would be beyond his socialization capacity. A commercial driver position for "Direct Mail" would also not be appropriate due to the vision restriction. The unarmed security positions as described do not bear DOT numbers and although this information was requested by counsel for Claimant, Mr. Bilski could not identify specific jobs in the DOT to which he was referring. Tr., 194, 198. Moreover, the testimony showed that Mr. Bilski did not reference the claimant's mental status and did not even know what the mental requirements were for each of the jobs he had recommended. If an vocational expert is uncertain whether the positions which he identified are compatible with the claimant's physical and mental capabilities, the expert's opinion cannot meet the employer's burden. ***Uglesich v. Stevedoring Servs. of America***, 24 BRBS 180 (1991); ***Davenport v. Daytona Marina & Boat Works***, 16 BRBS 196, 199-200 (1984). *See* ***Bostrom v. I.T.O. Corp.***, 11 BRBS 63, 65 n.2 (1979) (vocational rehabilitation specialist should test claimant's physical and intellectual capabilities before identifying specific, suitable jobs (dictum)).[51]

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[50] This means by inference, that he would also not be working around dangerous machinery that has moving parts and from working at heights.

[51] I also note that although I had accepted Mr. Bilski as an expert witness after *voir dire* by the Claimant, during testimony, Mr. Bilski expressed opinions that are remarkably vocationally ignorant. He did not recognize the terms, "non-exertional impairment" or "SVP", which, combined with his recommendations of inappropriate positions, leads me to conclude that he is unqualified to express a rational opinion in a matter involving paranoid schizophrenia, a condition competent to produce several types of non-exertional restrictions. I note that under the ***Hayes***,

As Mr. Bilski and the Employer/Carrier did not supply any jobs that meet the Claimant's medical profile, the Employer/Carrier has failed to meet the shifting burden of proof. ***Palombo***, *supra*, ***Salzano***, *supra*; ***Southern v. Farmers Export Company***, *supra*; ***New Orleans (Gulfwide) Stevedores v. Turner***, *supra*.

Therefore, the Claimant has established that he is entitled to permanent total disability. 30 USC §908(a).

First Choice Physician

The claimant has the right to choose an attending physician authorized by the Secretary to provide the required medical care. The Secretary is required to actively supervise the medical care provided and to receive periodic reports about it. The Secretary, through the district director, has the authority to determine the necessity, character, and sufficiency of present and future medical care, and may order a change of physicians or hospitals if the Secretary deems it desirable or necessary to the claimant's interest, either on the director's own initiative, or at employer's request. See 33 U.S.C. § 907(b). Under Section 7(b) and (c), the employer bears the burden of establishing that physicians who treated an injured worker were not authorized to provide treatment under the LHWCA. ***Roger's Terminal & Shipping Corp. v. Director, OWCP***, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986).

The Claimant initially sought to receive treatment from Dr. Pritchard. Later, Mr. Silverstein received authorization to receive treatment from Dr. Gordon. In an LS - 18 dated September 30, 2002, the Claimant designated Dr. Kohrman to be the treating physician. I note that the Employer has not controverted this issue and has not offered any substitute. It also did not argue or brief this issue.

Section 7(c)(2) of the 1984 LHWCA provides that when the employer or carrier learns of its employee's injury, either through written notice or as otherwise provided by the LHWCA, it must authorize medical treatment by the employee's chosen physician. Once a claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or deputy commissioner. See 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406.

An employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. ***Slattery Assocs. v. Lloyd***, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); ***Swain v. Bath Iron Works Corp***., 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment. ***Lloyd***, 725 F.2d at 787, 16 BRBS at 53 (CRT); ***Swain***, 14 BRBS at 664; ***Washington v. Cooper Stevedoring Co.***, 3 BRBS 474 (1976), *aff'd*, 556

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supra, standard, no mention was made regarding the Claimant's environmental problems, allergies, skin rashes and other impairments unrelated to the injury that may have a vocational impact. The record notes status post splenetic hematoma, sleep apnea, hearing disturbances, high blood pressure, hemorrhoids hepatitis "A", a hiatal hernia, chronic urticaria, allergies, chronic rhinitis, possible mixed hyperlipidemia, scabies, pruritis, and possible herpes. However, given the opinion above, further evaluation of these items is moot.

F.2d 268, 6 BRBS 324 (5th Cir. 1977); ***Buckhaults v. Shippers Stevedore Co.***, 2 BRBS 277 (1975).

I previously discussed that due to the Claimant's mental state, he had a dispute with Dr. Gordon. Consent to change a forst choice physician may be given in other cases upon a showing of good cause for change. ***Slattery Assocs. v. Lloyd***, 725 F.2d 780, 16 BRBS 44 (CRT) (D.C. Cir. 1984); ***Swain*** *sup*ra. The regulation only states that an employer may authorize a change for good cause; it is not required to authorize a change for this reason. ***Swain***, 14 BRBS at 665. I accept that the Claimant was effectively denied treatment and find that he has established good cause to have a physician of his choice, given his mental status.

Medical Treatment

The Claimant requests remedial or palliative care for neurosurgical evaluation, orthopedic care and treatment, psychiatric care and treatment and neurological evaluation. This request was made over a year ago and much of it has been mooted.

Section 7(a) of the LHWCA provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a). Medical care must be appropriate for the injury. See 20 C.F.R. § 702.402. Therefore, a judge may reject payment for unnecessary treatment. ***Ballesteros v. Willamette Western Corp***., 20 BRBS 184, 187 (1988); ***Turner v. Chesapeake & Potomac Tel. Co.***, 16 BRBS 255 (1984); Scott v. C & C Lumber Co., 9 BRBS 815 (1978). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. **Turner**, 16 BRBS at 257-58.

The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. For example, an employer must pay for the treatment of the claimant's myocardial infarction, if the judge finds that it is causally related to a prior work-related injury. See ***Atlantic Marine v. Bruce***, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980).

I have discussed the medical evidence at great length, *infra*. I find that the Claimant failed to establish any nexus between the Claimant's hands and wrists, and that the Claimant is not entitled to treatment for them. With respect to the neck and back, the Claimant failed to establish that the disk herniations and any alleged radiculopathy relate to this accident, and therefore, I do not authorize treatment for these conditions. Although he did not specifically request it, I do not authorize the need for an assistive ambulatory device at this time, as there is no prescription of record for one. I do authorize treatment for the permanent soft tissue injury he sustained to be rendered by Dr. Kohrman. I also authorize treatment for post traumatic headache.

With respect to the knees, I determined that the Claimant has established bilateral aggravation of both knees, and Dr. Pritchard is authorized to provide orthopedic treatment.

I find that the Claimant aggravated his pre-existing psychotic condition of paranoid schizophrenia and also has post traumatic stress disorder and that Dr. Boza is authorized to provide treatment.

The Claimant has not made a formal request for treatment with respect to the vision deficit. But I do find that the accident aggravated the Claimant's pre-existing vision problem. He also did not request treatment for post traumatic headache and dizziness, and although I find that they bear zero per cent (0%) disability, I find they were caused by the accident and he may be entitled to treatment for them. In ***Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]***, 991 F.2d 163 (5th Cir. 1993), the Fifth Circuit held that a "claimant is entitled to medical expenses for an injury resulting in zero impairment only upon a demonstration that the expenses are reasonably necessary and that an evidentiary basis exists to support such an award." 991 F.2d at 166. This is especially true where the award is for future medical expenses. ***Kirksey v. I.T.O. Corp. of Baltimore***, (BRB No. 96-0794)(Feb. 25, 1997) (Unpublished) (claimant suffered from a hearing loss injury with a zero impairment).

As to past medical expenses, Section 7(d)(1) details when a claimant who has paid his own medical expenses can be reimbursed by the employer. Section 7(d)(1) of the LHWCA, as amended in 1984, states:

> An employee is not entitled to reimbursement of money which he paid for medical or other treatment or services unless:
>
> (A) his employer refused or neglected to provide them and the employee has complied with subsections (b) and (c) and the applicable regulations, or
>
> (B) the nature of the injury required the treatment and services and, although his employer, supervisor, or foreman knew of the injury, he neglected to provide or authorize them.

33 U.S.C. § 907(d)(1).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; ***Shahady v. Atlas Tile & Marble Co.***, 682 F.2d 968 (D.C. Cir. 1982) (per curium), rev'g 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); ***McQuillen v. Horne Bros., Inc***., 16 BRBS 10 (1983); ***Jackson v. Ingalls Shipbuilding Div., Litton Sys***., 15 BRBS 299 (1983); ***Schoen v. U.S. Chamber of Commerce***, 30 BRBS 112 (1996).

The record reflects that the Claimant made the request for medical treatment in an amended LS 18 on or about September 30, 2002. the Employer/Carrier has not submitted any evidence to show that the request was controverted or that it even considered the request, and has not briefed this issue. Dr. Kohrman examined the Claimant on October 25, 2002. Cx 4. There apparently were no requests to authorize Dr. Boza, Kay or Hamberger, who are treating physicians.

Although Dr. Khrimstein that treatment of the soft tissue would cost between $1500 and $2000 per year, this is anticipatory.

However, the Claimant has not provided proof that he received any unauthorized medical treatment for which he seeks reimbursement. He also failed to provide requests to reimbursement for travel, also.

Failure to File Controversion

Section 14(d) sets out the procedure which the employer should follow in order to timely controvert the right to compensation. It provides:

> If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

33 U.S.C. § 914(d). In order to controvert the right to compensation, the employer must file a notice on or before the 14th day after it has knowledge of the alleged injury or death or is given notice under Section 12. See ***Spencer v. Baker Agric. Co.***, 16 BRBS 205, 209 (1984).

The Employer does not dispute that it had actual notice of the injury within two days of accident. It authorized payment and authorized Dr. Gordon to treat the Claimant. The Board has held that the employer's knowledge under Section 14(b) is imputed to the carrier. ***Cooper v. Cooper Assocs.***, 7 BRBS 853, 866 (1978), *aff'd in part, rev'd in part sub nom.* ***Director, OWCP v. Cooper Assocs***., 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979). The District of Columbia Circuit affirmed on other grounds, noting that it would seriously consider making an exception to Section 35 where the interests of the employer and its carrier differed. Id. at 1389, 10 BRBS at 1063.[52]

If the employer fails to controvert the disputed portion, a Section 14(e) penalty may be assessed against that amount. ***Browder v. Dillingham Ship Repair***, 25 BRBS 88, 90-91 (1991); ***Morgan v. Nacirema Operating Co.***, 20 BRBS 252, 262-63 (ALJ) (1987) (where employer paid part of compensation due claimant, did not pay or controvert remainder, and claimant's award based on amount greater than what employer paid, claimant was entitled to Section 14(e) assessment).

The record shows that the Claimant was paid Temporary Total Disability payments from March 27, 2001 to August 27, 2001. Ex 21; Tr., 53 - 54. 385. The Employer has not filed a notice to controvert benefits. In this fact pattern, I consider the payments for temporary total benefits after July 24, 2001 to be voluntary payments. However, the record does not show that the Claimant was provided notice that the payments were stopped and the reason why they would cease. A notice of controversion must be filed whenever a dispute arises over the amount of compensation due, even if some compensation is voluntarily paid. ***Lorenz v. FMC Corp., Marine & Rail Equip***. Div., 12 BRBS 592, 595 (1980). The employer should pay the compensation it considers due and controvert the remainder. ***Alston v. United Brands*** Co., 5 BRBS 600, 607 (1977).

Liability for the Section 14(e) penalty ceases on the date of the filing of the notice of controversion or on the date of the informal conference, whichever comes first. ***National Steel & Shipbuilding Co. v. U.S. Dep't of Labor***, 606 F.2d 875, 880, 11 BRBS 68, 71 (9th Cir. 1979), aff'g in part and rev'g in part ***Holston v. National Steel & Shipbuilding Co.***, 5 BRBS 794 (1977) ("[F]or purposes of the test established in Bonner, the date 'the Department knew of the facts a

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[52] The Board has held that the assessment of additional compensation under Section 14(e) is mandatory and may therefore be raised at any time. ***McNeil v. Prolerized New England Co.***, 11 BRBS 576, 578 (1979), *aff'd sub nom.* ***Prolerized New England Co. v. Benefits Review Bd.***, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); ***Cuellar v. Garvey Grain Co.***, 11 BRBS 441, 448 (1979), aff'd sub nom. ***Garvey Grain Co. v. Director, OWCP***, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981).

proper notice would have revealed' is the date of the informal conference."); ***Browder v. Dillingham Ship Repair***, 24 BRBS 216, 220, on recon., 25 BRBS 88 (1991) (employer liable for Section 14(e) penalty, applicable from time of injury until date of informal conference).

Therefore, I find that the Employer/Carrier is liable for Section 14(e) payments from August 27, 2001 until the date of the informal conference in this matter. The parties did not provide me with that date, but the District Director can easily ascertain the correct amount of penalty under Section 14(e).

Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp***., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co.***, *aff'd in pertinent part and rev'd on other grounds, sub nom.* ***Newport News v. Director, OWCP***, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a
fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United
States Treasury Bills . . . ." ***Grant v. Portland Stevedoring Company, et al.***, 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See ***Grant v. Portland Stevedoring Company***, et al., 17 BRBS 20 (1985). The
appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Attorney's Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. ***Revoir v. General Dynamics Corp.***, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. ***Miller v. Prolerized New England Co.***, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after the date this matter was referred from the District Director. Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. I note that Claimant's prior attorney. Howard Silverstein, Esquire, has filed a charging lien. A service sheet showing that service has been made on all parties, including the Claimant, and prior counsel, must accompany the petition. Parties have twenty (20) days following

the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following **ORDER**:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from March 27, 2001 to July 23, 2001 to the present, based on an average weekly wage of $1328.38., in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from July 24, 2001 to the present, based on an average weekly wage of $1328.38., in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2002, for the applicable period of permanent total disability.

4. Dr. Kohrman is the first choice physician for treatment.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's March 26, 2001 work injury, pursuant to the provisions of Section 7 of the Act, as discussed in detail in the body of this Decision and Order. The following are specifically authorized:

   A. Treatment for the permanent soft tissue injury he sustained.

   B. Treatment for post traumatic headache, dizziness and vision deficit

   C. Treatment for bilateral aggravation of both knees.

   D. Treatment for aggravation of a pre-existing psychotic condition of paranoid schizophrenia and post traumatic stress disorder.

Treatment for herniations in the neck and back and any resultant radiculopathy are found non compensable and are not authorized.

6. Employer shall receive credit for all compensation heretofore paid, as and when paid.

7. Employer shall pay penalties under Section 14 (e) of the Act from August 28, 2001 to the date of the informal conference in this matter.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); ***Grant v. Portland Stevedoring Co., et al.***, 16 BRBS 267 (1984).

9. The District Director shall make all necessary calculations to effectuate this **ORDER.**

10. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

11. Pursuant to the parties' stipulations all matters relating to Section 8 (f) of the Act are remanded to the District Director.

SO ORDERED

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DANIEL F. SOLOMON
Administrative Law Judge